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Supreme Court of the United States

OCTOBER TERM, 1933.

No. 868.

STATE OF OHIO, PUBLIC UTILITIES COMMISSION OF OHIO, THE WHEELING AND LAKE ERIE RAILWAY COMPANY, ET AL., *Appellants*,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION; THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., *Appellees*.

No. 886.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., *Appellants*,

vs.

STATE OF OHIO, PUBLIC UTILITIES COMMISSION OF OHIO, THE WHEELING AND LAKE ERIE RAILWAY COMPANY, ET AL., *Appellees*,

Appeals from the District Court of the United States for the Southern District of Ohio.

BRIEF FOR APPELLANTS IN NO. 868 AND APPELLEES IN NO. 886.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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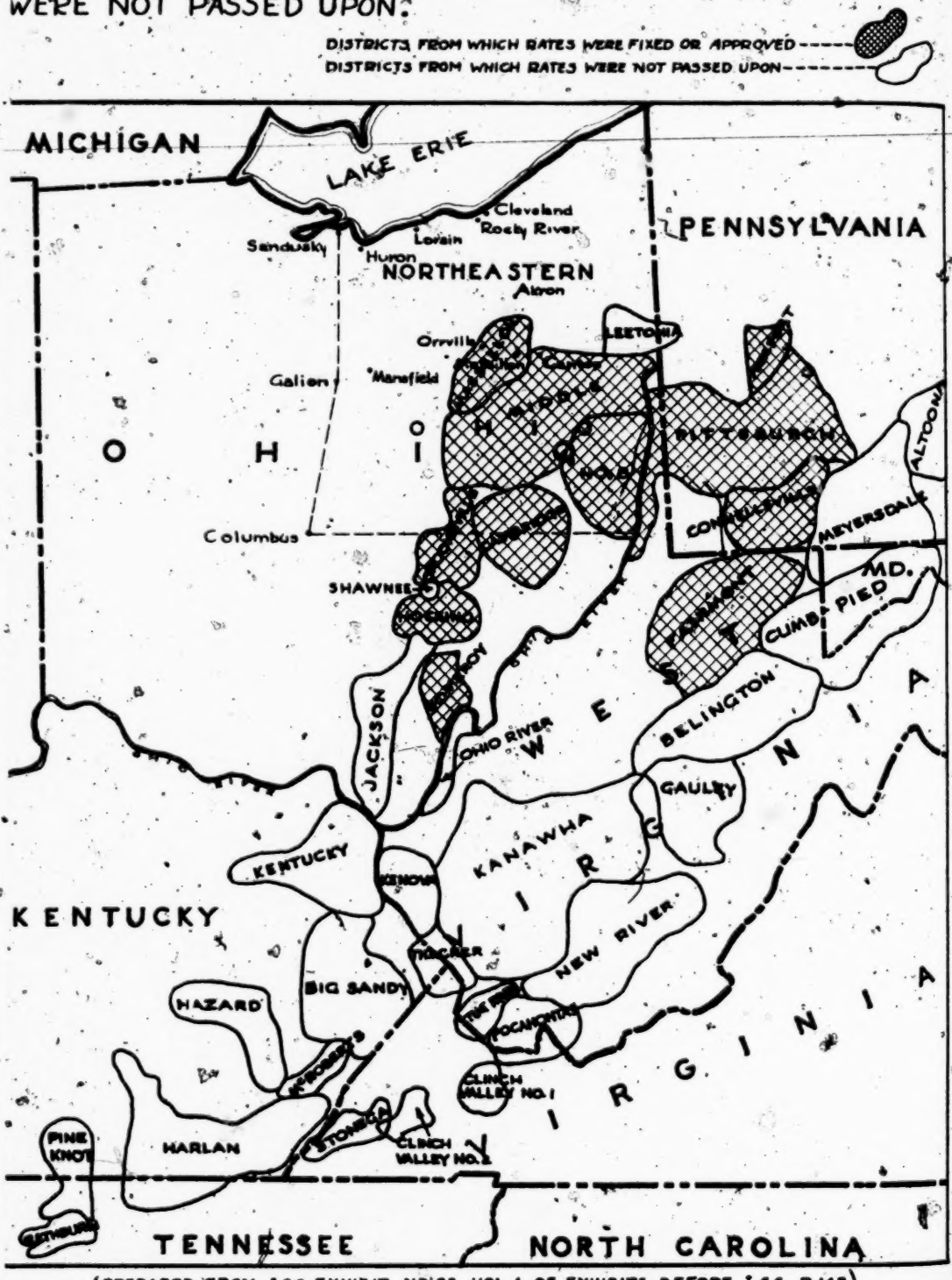

(PREPARED FROM I.C.C. EXHIBIT NO. 22, VOL. 1 OF EXHIBITS BEFORE I.C.C., P. 143)

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 868.

STATE OF OHIO, PUBLIC UTILITIES COMMISSION OF OHIO, THE WHEELING AND LAKE ERIE RAILWAY COMPANY, ET AL., *Appellants*,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., *Appellees*.

No. 386.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., *Appellants*,

vs.

STATE OF OHIO, PUBLIC UTILITIES COMMISSION OF OHIO, THE WHEELING AND LAKE ERIE RAILWAY COMPANY, ET AL., *Appellees*,

Appeals from the District Court of the United States for the Southern District of Ohio.

BRIEF FOR APPELLANTS IN NO. 868 AND APPELLEES IN NO. 386.

REFERENCE TO OPINION DELIVERED IN COURT BELOW.

The opinion delivered in the court below has not been officially reported. It will be found in the record at pages 466-472.

STATEMENT AS TO JURISDICTION.

A statement as to jurisdiction was duly filed by appellants in No. 868, and probable jurisdiction was noted by the Court on April 2, 1934.

STATEMENT OF THE CASE.

This case is a consolidation by order of the court below (R. 482-485) of two suits brought, one by the State of Ohio and the Public Utilities Commission of Ohio, and the other by The Wheeling and Lake Erie Railway Company, against United States of America and Interstate Commerce Commission, under the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 219, Sec. 41; subdiv. 28, Secs. 44, 45 and 47, Title 28, U. S. C. A.) to enjoin the order of the Interstate Commerce Commission of May 2, 1933, in its Docket No. 25566, *Intrastate Rates on Bituminous Coal Within the State of Ohio* (R. 77-78).

An understanding of the questions involved in this appeal requires a brief description of what is known in railroad rate terminology as the crescent coal rate adjustment of the Appalachian fields. The rates in this adjustment apply (a) from coal producing districts in eastern and southern Ohio and (b) from coal producing districts in western Pennsylvania, western Maryland, West Virginia, western Virginia, eastern Kentucky and eastern Tennessee, the location of all of which is shown on the map at the opening of this brief. The term "crescent" arises from the fact that the districts outside of Ohio lie in two rough crescents extending from western Pennsylvania on the northeast to western Virginia and eastern Tennessee on the southwest. The tier of these districts nearer to Ohio and therefore on the inner side of the crescent shaped area is known as the "inner crescent," and the outer tier is known as the "outer crescent".

The case in which the order attacked was made was a consolidated proceeding involving six other cases: No. 25590, a complaint assailing the rates from western Pennsylvania to northeastern Ohio; No. 25656 and No. 25670, complaints assailing the rates from northern West Virginia to northeastern Ohio; No. 25657, a complaint assailing the rates from southern West Virginia and eastern

Kentucky to northeastern Ohio; and I. & S. Nos. 3801 and 3833, investigations of the reduction and subsequent restoration of certain rates from western Pennsylvania to northeastern Ohio.

In making the order here in issue the Commission proceeded under the provisions of section 13 (3) and (4) of the Interstate Commerce Act,* (c. 91, Sec. 416, 41 Stat. 484; Sec. 13 (3) and (4), Title 49, U. S. C. A.), which prohibits and makes unlawful intrastate rates which cause undue preference and prejudice as between persons and localities in intrastate and interstate commerce or unjust discrimination against interstate commerce, and authorizes the Commission to prescribe the intrastate rates necessary to remove such undue preference, prejudice or discrimination, orders of State authorities to the contrary notwithstanding. By its order the Commission fixed the rates for the intrastate carriage of bituminous coal from the Cambridge district to Mansfield and from the Ohio No. 8, Middle, Massillon, Cambridge, Crooksville, Hocking and Pomeroy districts to certain other destinations in northeastern Ohio, including Canton, Massillon, Cleveland, Lorain, Huron, Akron, Orrville, Rocky River and intermediate points, on the ground that this was necessary to remove both undue preference and prejudice as between persons and localities and unjust discrimination against interstate commerce. These districts and destinations, and the limits of northeastern Ohio as that term is defined in the Commission's report, are shown on the map already referred to. The effect of the order was to restore the rates in question to the level at which they stood immediately prior to August 1, 1932. On or after that date, the rates in controversy had been reduced either by orders of the Public Utilities Commission of Ohio or voluntarily by the carriers with the approval of the Ohio Commission. The orders of the Ohio Commission were as follows:

*Section 13 (3) and (4) of the Interstate Commerce Act will be found set out in full in Appendix A.

Republic Steel Corp. v. B. & O. R. R. Co., Docket No. 7252, effective August 1, 1932, reducing the rates on bituminous coal from the Massillon, Middle and Ohio No. 8 districts to Canton and Massillon. (R. 119-121).

Empire Steel Corp. v. B. & O. R. R. Co., Docket No. 7036, effective August 20, 1932, reducing the rate on bituminous coal from the Cambridge district to Mansfield. (Vol. I, Exhibits before I. C. C., p. 60)

Application of The Wheeling and Lake Erie Railway Company, et al., Special Permission No. 6492, effective August 1, 1932, granting permission to establish on short notice reduced rates on bituminous coal from the Massillon, Middle and Ohio No. 8 districts to the destinations in question other than Canton, Massillon and Mansfield. (R. 145-148)

Application of The Pittsburgh & West Virginia Railway Company, Special Permission No. 6524, effective August 12, 1932, granting permission to establish on short notice reduced rates on bituminous coal from the Ohio No. 8 district to the destinations in question other than Canton, Massillon and Mansfield. (R. 559)

Application of the Baltimore and Ohio Railroad Company, et al., Special Permission No. 6570, effective September 2, 1932, granting permission to establish on short notice reduced rates from the Middle, Massillon and Ohio No. 8 districts to the destinations in question other than Canton, Massillon and Mansfield. (R. 562)

Investigation of Rates on Bituminous Coal from Cambridge, Crooksville and Hocking Districts, Docket No. 8072, effective September 20, 1932, reducing the rates from the named districts to the destinations in question, other than Canton, Massillon and Mansfield, to the former relation with Ohio No. 8. (R. 148-151)

Investigation of Rates on Bituminous Coal from Pomeroy District, Docket No. 8097, effective October 28, 1932, reducing the rates from that district to the destinations in question other than Canton, Massillon and Mansfield, to the former relation with Ohio No. 8. (R. 151-154)

The reduced rates from the Ohio No. 8 district, which is very much the most important, to the principal destinations, and the pre-existing rates required to be restored by the order here complained of, were as follows:

Destination	Original Rate (cents per ton)	Reduced Rate (cents per ton)
Canton, O.	126	108
Massillon, O.	126	108
Orrville, O.	151	122
Akron, O.	151	128
Cleveland, O.	174	145
Rocky River, O.	174	145
Lorain, O.	174	145
Huron, O.	174	155

The petitions of the plaintiffs below sought injunctions perpetually restraining the enforcement of the Commission's order in No. 25566 on substantially identical allegations.* They set out in considerably greater detail the infirmities of the Commission's order stated in the summary of the argument hereinafter set forth.

In each of these cases in the court below numerous persons interested as shippers or consumers of coal whose interests were affected by the order intervened as parties plaintiff. The Public Service Commission of the Commonwealth of Pennsylvania, certain railroads interested as carriers of coal from points of origin outside of Ohio to the

*The original petitions below sought injunctions also against the Commission's order in its Docket No. 25885, *Surcharge on Bituminous Coal within Ohio,* 192 I. C. C. 734, whereby the Commission had required the surcharges authorized by it in *Fifteen Per Cent Case,* 1931, 178 I. C. C. 539; 179 I. C. C. 215; 191 I. C. C. 361, to be added to all intrastate rates on bituminous coal in the state of Ohio. This order expired by its own terms on September 30, 1933, and the portions of the decrees below dismissing the petitions as to this order were not appealed from.

destinations in question and certain mining interests in Pennsylvania and West Virginia intervened in both cases as parties defendant.

The court below finding that the Commission's order was justified upon the ground that the reduced Ohio rates were unduly and unreasonably prejudicial against persons and localities in interstate commerce, but refraining from finding that it was justified upon the ground that the reduced Ohio rates were unjustly discriminatory against interstate commerce, on January 19, 1934, entered final decrees dismissing plaintiffs' petitions and dissolving the interlocutory injunctions theretofore issued against the Commission's order. Plaintiffs below and all of the intervening plaintiffs there, save three who were duly severed (R. 486), appealed from portions of these decrees in No. 868, October Term, 1933, in this Court.

On the same date, the court below made orders staying its final decrees for sixty days to enable the plaintiffs to perfect their appeal to this Court. (R. 531-533.) Defendants and intervening defendants appealed from the orders of the court below granting the stay, in No. 886, October Term, 1933, in this Court, and the stay orders were vacated, February 12, 1934, by an interlocutory order of this Court. They expired by their own terms on March 20, 1934.

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED.

On this appeal appellants will urge all of their assigned errors except XI and XXIII.

SUMMARY OF ARGUMENT.

The appellants contend that they were denied a full hearing by the Commission in that the Commission prejudged the question whether the reduced Ohio rates were lawful, as appears, first, by the first sentence of the report; second, by the Commission's attempt to marshal the evidence so as

to support its predetermination that the reduced Ohio rates were unlawful; and, third, by the Commission's resort to a presumption against the legality of the reduced Ohio rates irrebuttable in practice and without which its predetermination could not have been supported.

The finding which the Commission purported to make that the restoration of the state rates required by it is necessary to remove undue preference and prejudice as between persons and localities in intrastate and interstate commerce is not supported by evidence. The facts upon which it purports to rest are that the relationship between state and interstate rates, which the Commission required to be restored, was the result of commercial and carrier competition over a long period of years; that heavy investments had been made in mining properties in other states in reliance on these relationships, which were seriously affected by the Ohio reductions; that coal had moved freely both on the Ohio rates and on the competitive interstate rates before the Ohio reductions; and that the rates should be determined with great regard for the value of the service and for existing competitive conditions as distinguished from distance which, if given effect, would disrupt the relations referred to and prevent the more remote districts from competing. The doctrine of prescriptive rights in rate levels and rate relationships thus invoked by the Commission for the purpose of protecting a traditional adjustment has no warrant in law. The standards established by the Interstate Commerce Act "are transportation standards, not criteria of general welfare." Upon transportation standards it was impossible for the Commission to arrive at its conclusion that the former state rates must be restored to avoid undue preference and prejudice as between persons and localities in intrastate and interstate commerce.

The Commission exceeded its authority in increasing state rates on a single commodity between particular points

in Ohio without having first found reasonable, or made reasonable, all substantially competitive interstate rates to the same destinations. The interstate rates which it did first find reasonable were the highest part only of an extensive group adjustment of interstate rates, most of which are strongly competitive with the Ohio rates involved. It did not find or make reasonable any of the other competitive interstate rates. The effect of this selection of the highest interstate rates in this adjustment as a norm was to require the Ohio rates to be raised above a maximum reasonable level and above the actual level of the competitive interstate rates considered in the aggregate, and to expose Ohio commerce to the unfair competition of interstate commerce moving on the competitive interstate rates in the said adjustment which the Commission refused to consider or fix and which are below the maximum of reasonableness.

The Commission's order cannot be upheld as a valid exercise of its power to remove revenue discrimination against interstate commerce because the Commission did not make the essential finding that the increases in intrastate rates required by it would produce increased intrastate revenues and, on the record, it could not have made such a finding.

The orders appealed from in No. 886 expired by their own terms on March 20, 1934. That appeal is therefore merely moot and should be dismissed.

ARGUMENT.

I.

THE INTERSTATE COMMERCE COMMISSION DENIED THE STATE OF OHIO AND PERSONS INTERESTED IN DEFENDING THE INTRASTATE RATES THE FULL HEARING REQUIRED BY SECTION 13 (4) OF THE INTERSTATE COMMERCE ACT.

(Assignments of Error I, II, III, V, VIII, X, XII, XIII, XIV, XX, XXI, XXII, XXIV, XXV)

A finding by the Interstate Commerce Commission *after full hearing* that a state rate is unlawfully discriminatory against some phase of interstate commerce* is a prerequisite to the Commission's power to increase such a rate. This clearly appears from a reading of section 13 (4) of the Interstate Commerce Act, as well as from settled judicial construction. *Florida v. United States*, — U. S. —, decided April 7, 1934. The requirement of full hearing is not satisfied by any multiplication of formalities. Witnesses may have been called and heard, arguments patiently listened to, findings supported by some evidence covering all the issues made, and yet if, at the end, the Commission ordered what it had resolved in the beginning it would order, if its discretion was controlled by a preconception of the result, if the only action of its judgment upon the evidence was to attempt to marshal it so as to support the predetermination, the order cannot be saved by the punctiliousness with which the formalities were observed. That is to say, the rate established by the authority of the State must be found unlawful by a tribunal "which hears *before* it condemns; which proceeds *upon inquiry*, and renders judgment only *after* trial." (Emphasis ours.) Argument of Mr. Webster, *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 581.

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*Wherever in this section of the brief reference is made to discrimination or prejudice against interstate commerce, it is intended to include discriminations against persons and localities as well as discriminations affecting the revenues of the carriers.

The report of the Commission in this case shows that the State of Ohio and the parties interested in defending its rates involved in this controversy, were denied the essence of a full hearing. This denial resulted to a great degree, we think, from the failure of the Commission to note the difference between a proceeding in which it was asked to reduce an interstate rate, where it might properly presume that the existing rate and its relationship to other rates were proper, and a case where it undertakes under section 13 (4) to review the action of State authorities upon state rates, where every presumption, as we shall endeavor to show, is in favor of the legality of the State action. Misconceiving its function in the proceeding, it was unfortunately led not only to presume but to predetermine that the rates made or imposed by the authority of the State of Ohio were unlawful rates. This predetermination appears in the first sentence of the Commission's report, which plainly shows that the Commission had determined that the Ohio rates were in violation of section 13 (4) when it began the investigation which resulted in the order here complained of. That this confession with which the report begins is true is made apparent by the whole tenor of the document, and is manifested, first, by an unsuccessful attempt to conform the evidence to the predetermination of the essential issue, and, second, when it became apparent that the facts were too stubborn, by resort to an unheard of presumption against the legality of the Ohio rates, rebuttable, not by the weight of the evidence, or even by evidence establishing the contrary beyond a reasonable doubt, but by "only the most convincing evidence".

That is to say, the report shows clearly the predetermination of the issue, the unsuccessful attempt to compel the evidence to support the predetermination, and failing that, the invention of a presumption against the Ohio rates impossible in practice to overcome.

THE ADMISSION OF PREDETERMINATION.

In the opening paragraph of its report, the Commission said, with unessentials deleted (R. 19-20):

> "* * * we entered upon an investigation concerning the lawfulness of all rates and charges for the intrastate transportation of bituminous coal, in carloads, from eastern Ohio mines to destinations in northeastern Ohio * * * *with a view to prescribing* such nondiscriminatory, nonprejudicial, and otherwise lawful rates and charges for such traffic as the facts and circumstances may warrant." (Emphasis ours.)

That is to say, the Commission entered upon the investigation into the lawfulness of the Ohio rates *resolved to find them unlawful so that it might prescribe higher rates.*

It is perfectly clear that the federal government has no general jurisdiction over the internal commerce of a state. This Court has established the principle that as a corollary of the federal government's express power to regulate commerce among the states and with foreign nations it may prevent a State from so exerting its power to regulate its internal commerce upon an interstate carrier as to produce an unjust discrimination against interstate commerce. *Houston & Texas Ry. v. United States*, 234 U. S. 342. In the discharge of its paramount duty to keep the federal and state governments within their respective constitutional limits, this Court has never permitted itself to assume that any action of a State was unlawful. *Corporation Commission v. Lowe*, 281 U. S. 431, 438; *Sweet v. Rechel*, 159 U. S. 380, 392; *Home Telephone Co. v. Los Angeles*, 211 U. S. 265, 281. When Congress expressly gave to the Commission power under section 13 (4) to cure unlawful discriminations and prejudices against interstate commerce, it distinctly negatived the idea that the Commission could assume in any circumstances that the State had been abusing its power over its internal commerce. It expressly enacted that the Commission's power to fix intrastate rates

began only when, after full hearing, it found that the intrastate rates were unlawful under the provisions of section 13 (4). *Board v. Great Northern Ry.*, 281 U. S. 412, 426, 430.

THE COMMISSION'S ATTEMPT TO MARSHAL THE EVIDENCE

At this point we are inviting attention to the state of the evidence before the Commission and the manner in which the Commission dealt with it, not to ask the Court to make findings of fact, but solely for the purpose of showing the Commission's struggle against the plain import of the evidence as additional proof that the essential issue was prejudged.

The initial reductions in the rates from the eastern Ohio fields ordered by the Public Utilities Commission of Ohio, *Republic Steel Corp. v. B. & O. R. R. Co.*, P. U. C. of Ohio No. 7252 (R. 86-121), and voluntarily extended by The Wheeling and Lake Erie Railway Company with the approval of the State Commission, were arrived at by the application of a mileage scale prescribed by the Interstate Commerce Commission in its Docket Nos. 23130 and 23922* as a basis for fixing maximum reasonable rates on coal between points in central eastern Illinois and from points in southwestern Indiana to the same destinations.† This scale was prescribed by the Commission in cases involving the rates on a very large movement of coal, and because of that fact the interested parties prepared voluminous evidence as to the propriety of the rates. See *Intrastate Rates on Bituminous Coal in Illinois*, 182 I. C. C. 537, 546, 549. Because of the importance of the movement involved, it may be assumed that in fixing these rates the

Intrastate Rates on Bituminous Coal in Illinois, 182 I. C. C. 537; *Coal Trade Assn. v. Baltimore & O. R. Co.*, 185 I. C. C. 225.

†The territory for which the scale was prescribed in the cases referred to is shown on I. C. C. Exhibit 143 (Vol. III, Exhibits before I. C. C. p. 27). This territory is hereinafter referred to for convenience as Indiana-Illinois scale territory.

Commission was better than ordinarily informed by the contentions of the parties.

Unless, therefore, it appeared that operating conditions from the Ohio No. 8, Middle and Massillon fields to the destinations in question were, as a whole, more severe than those in the portions of the Indiana and Illinois fields involved in the cases in which the scale was prescribed, there was a strong inference that the Ohio rates were maximum reasonable rates, and hence beyond the reach of the Interstate Commerce Commission. *Georgia Comm. v. United States,* 283 U. S. 765, 770. To support the contention that operating conditions in Ohio were generally comparable to those in Indiana-Illinois scale territory, the Ohio interests called an expert witness, C. B. Ackerman, who testified to having made a detailed study of operating conditions in the two regions. (R. 1176-1177, 1367-1373) He introduced numerous exhibits showing the tractive effort of the locomotives used over the various routes by which coal moved in the two sections and the tonnage rating of these locomotives, taken from the timetables of the various carriers; and his conclusion from a study of these exhibits was that the expenditure of locomotive tractive effort for the transportation of one ton one mile from the Ohio fields to northeastern Ohio is no greater than in Indiana-Illinois scale territory. (I. C. C. Exhibits 266 and 267; Vol. III, Exhibits before I. C. C., pp. 305, 306)

The attack upon the Ohio rates was made by three large railroad systems which haul coal in both the regions in question, viz: the Pennsylvania, New York Central and Baltimore & Ohio. They assailed the Ackerman comparisons in principle and in detail. They set up, as the report of the Commission shows, "twenty-one alleged categories of errors". (R. 34) They claimed that Ackerman was inaccurate, and that in the nature of things he could not be accurate; that no one, except themselves, could supply the data from which comparisons could be fairly made (R. 1621-

1622); and they persistently refused to supply that data. (R. 1670-1671, 1708-1712, 1717-1718, 1722-1723, 1746, 1748, 1750-1751, 1766, 1770-1771)

But the whole attack on the Ackerman exhibits was a sham battle, for the opposing carriers admitted his conclusion *sub silentio*. Why should the time of the Commission and the parties have been wasted by detailing 21 alleged categories of errors when his evidence was directed only toward establishing a conclusion that operating conditions in Indiana-Illinois scale territory are not less severe than in Ohio? Whether this conclusion was true or false was peculiarly within the knowledge of the Pennsylvania, New York Central and Baltimore & Ohio, which were operating and hauling coal in both regions. They offered no proof that operating conditions in Ohio were more severe than in Indiana and Illinois, but on the contrary, their expert witnesses admitted on cross-examination that they knew of no transportation reason why the rates in the two sections should be on different levels. (R. 1548, 1566.)

This left the Commission without any apparent means of escape from the controlling nature of the Indiana-Illinois comparisons. It had recently prescribed the scale itself in a 13th section proceeding involving the rates in that territory and a related proceeding involving the rates from Indiana to Illinois. The carriers, which served not only that territory but also the territory in issue here, had offered no evidence showing any difference in circumstances and conditions and their witnesses had conceded that they knew of no such differences. In an effort to avoid the inevitable conclusion from such a record, the majority, in the language of Commissioner Eastman (R. 67), invoked the "principle" that rates in Illinois should be lower than rates in Ohio, despite the similarity of conditions. (R. 36-37) They tried to justify this "principle" by reference to evidence of competition in the coal markets of Illinois which they attempted to distinguish

in character and degree from the competition in the coal markets of Ohio and by reference to the Commission's decisions fixing rates on various commodities in Illinois lower than in Ohio. (R. 3[illegible]7) But, as Commissioner Eastman again pointed out, the report showed at least as intense competition in northeastern Ohio as in Illinois (R. 66); and in any event maximum reasonable rates have never been fixed with primary regard for competition. (R. 66) *Southern Class Rate Investigation*, 100 I. C. C. 513, 611.

That the Indiana-Illinois scale was in fact fixed as a maximum reasonable scale is obvious from the ultimate finding in No. 23922 to the effect that the rates from Indiana to Illinois, there assailed, were unreasonable "to the extent that they exceed or may exceed" the scale therein prescribed. *Coal Trade Assn. of Indiana v. Baltimore & O. R. Co.*, 190 I. C. C. 743, 746.

In addition to the Indiana-Illinois comparisons the Commission had before it, as bearing upon the propriety of the reduced Ohio rates, a detailed cost study, offered in evidence by The Wheeling and Lake Erie Railway Company, an appellant herein, which is actually engaged in hauling coal from eastern Ohio fields to the destinations in controversy, which was supported by the testimony of George Durham, its Vice President and General Manager. This study showed that the actual cost of the movement from the Ohio No. 8 field to Cleveland, including general and administrative overhead and deficit from passenger operations, was 80.2 cents per ton and that the costs to the other destinations were proportionate. Now, if the Wheeling's cost study is correct in its conclusion, it would be a bold man who could contend that a rate of $1.45 per ton to Cleveland is less than a maximum reasonable rate; and no one, so far as we are advised, has done so on that basis.

The opposing carriers attempted to meet the Wheeling's cost study with the same tactics that they used in attempting to meet the Indiana-Illinois comparisons. They offered

numerous technical objections to the method of the study, to which the Wheeling replied in a verified statement submitted by stipulation after the close of the testimony. (R. 1792-1818) Again they withheld evidence of the ultimate fact peculiarly within their knowledge. They made no attempt to show their own costs for hauling coal from the same origins to the same destinations.

To cover the poverty of their case, both with respect to the Indiana-Illinois comparison and the Wheeling cost study, the carriers opposing the Ohio rates entered upon the record an objection to any testimony with reference to the reasonableness of the reduced Ohio rates, predicated upon a theory of the law in the teeth of this Court's holding in *Georgia Comm. v. United States*, 283 U. S. 765, 770, that intrastate rates cannot be increased by the Commission above the level of maximum reasonableness. (R. 931-932)

Now, the report of the Commission shows what it did with these elaborate studies. The Ackerman comparisons were belittled on the ground that "theoretical or calculated tractive effort is not usually employed in fixing tonnage ratings, which are determined by use of dynamometer cars or actual road tests." (R. 34) Of course Mr. Ackerman could not use dynamometer cars or make actual road tests over the lines of the objecting carriers. But they could; and if the results obtained by the use of such cars or tests would have seriously disturbed the conclusions reached by Mr. Ackerman from the theoretical or calculated tractive effort of the locomotives, it may be safely presumed that evidence to that effect would have been forthcoming. Also while the report adverts to the "twenty-one alleged categories of errors" pointed out by witnesses for the opposing carriers, it makes no effort to determine which, if any, of the criticisms were sound or their ultimate effect.

Finally, the Commission adverts to the many variables encountered in actual operation. (R. 34) These variables, of course, are the things which the opposing carriers claimed

were peculiarly within their own knowledge and which they refused to disclose. The general result of the Commission's discussion of the evidence is that Mr. Ackerman's conclusion is impaired in an unascertained degree.

With reference to the inferences that inevitably arise from the failure of the carriers opposing the reduced Ohio rates to put upon the record their undoubted knowledge as to the comparative transportation conditions in Indiana and Illinois on the one hand and in eastern Ohio on the other, and their failure to show their own costs for the movement of coal from the eastern Ohio fields to the destinations in question, we cite the decision of this Court in *Mammoth Oil Co. v. United States*, 275 U. S. 13, in which the Court (pages 51 and 52) referred to the following statement by Lord Mansfield in *Blatch v. Archer*, Cowper 63, 65, as a familiar rule of evidence:

> "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted."

This Court there applied the principle to the failure of the president of the defendant company to testify as to transactions in which he had participated after the government had introduced circumstantial evidence as to the character of those transactions.

The Commission's attack on the Wheeling cost study is somewhat more detailed. In particular it criticizes the study for the use of hypothetical through trains from the coal district to the several destinations, as the basis for estimating the number of service units involved in transporting coal to these destinations, instead of the trains in which the coal was actually handled, as shown in the study. (R. 32-33.) The Commission states that using the trains in which the coal was actually handled, the same data as to

unit costs, and following the same general methods of computation employed in the study, but computing the costs separately for the movement from the coal district to Brewster and for the movement from Brewster to each of the six destinations, and adding the two figures together in the case of each destination, it has been found that the costs shown in the study are underestimated on this account to the extent of twelve per cent, or 9.6 cents, to Cleveland and somewhat smaller percentages to the other destinations. We have been unable up to this time to provoke the Commission into a statement as to how that calculation was made. A correct calculation of the cost to Cleveland on the basis preferred by the Commission, predicated entirely upon the evidence in the record, is attached to this brief as Appendix B. *It shows that if the cost is computed on the Commission's own basis of the actual trains in which the coal moved, the difference is only half a cent per ton.*

Up to the writing of this brief, the Commission has neither repudiated nor defended this gross mathematical error. It stands mute. We believe that the Court is warranted in assuming that the Commission's other criticisms of the Wheeling cost study are equally devoid of merit. They were fully met in the evidence (R. 1792-1818), which is summarized in Appendix C of this brief; but this evidence was not referred to in the report, except in Commissioner Eastman's penetrating dissent, where he said (R. 68):

> "2. The Cost Study.—An elaborate cost study was submitted by the Wheeling to show that the reduced rates produce large earnings, not over out-of-pocket costs merely, but over a full allocation of operating expenses including the deficit incurred in passenger operations. In concluding that this study is not entitled to weight, the majority seem to me to accept at face value many of the criticisms of the opposing carriers without any careful analysis of the answers to these criticisms which were offered by the Wheeling. Nor is

any attempt made to arrive at a corrected result after making allowance for criticisms found upon thorough analysis to be valid, although the margin of earnings shown by the Wheeling is ample enough to absorb substantial corrections without vitiating the conclusion that the reduced rates are profitable. It is significant, also, that no countervailing cost studies were submitted by the opposing carriers."

We have thus far discussed the elaborate and detailed evidence presented by the Ohio interests to show that the reduced Ohio rates were not less than maximum reasonable rates, and the failure of the opposing carriers to introduce evidence, unquestionably in their possession, which would expose any substantial errors in our case. But we do not mean to imply that our opponents had no evidence. They offered evidence that there were rates on coal between certain points in Ohio, western Pennsylvania, New York and Maryland that were on a level as high as the rates from western Pennsylvania and northern West Virginia to northeastern Ohio and that the latter rates were therefore reasonable. It was argued from this that the reduced Ohio rates, concededly on a lower level, were less than maximum reasonable rates and were unlawfully discriminatory against interstate commerce.

Now, as to these comparative rates between points in Ohio, Pennsylvania, Maryland and New York, there is a remarkable dearth of evidence. It is true that the Ohio rates used as comparatives apply in the same general territory as the state rates here in issue, but they have never been passed upon by any regulatory authority and, as was pointed out in the *Republic case* (R. 116), they are on a plateau. They have no probative value in testing the rates which have been fixed by the Ohio Commission and are here in issue. The Pennsylvania, New York and Maryland rates relied upon by our opponents were not supported by any evidence as to the amount of traffic moving upon them and, as to many of them, there

was no showing with regard to transportation conditions. Commissioner Eastman, in his dissenting opinion, disposes of these comparisons by saying that many of them "are drawn from eastern districts where we have repeatedly found the transportation conditions surrounding the movement of coal to be more burdensome than in the central territory districts west of the Alleghenies." (R. 68) He then points out that the citations of the cases dealing with rates in the eastern districts "are followed by a statement that the record is replete with 'comparisons of this nature' which indicate that the former rates in Ohio were not higher than rates in the same general territory." (R. 68) This makes it clear that the criterion which the Commission accepted as controlling on the question of the level of the rates *west* of the Alleghenies, included the rate level in districts *east* of the Alleghenies *where it has repeatedly found that transportation conditions are more burdensome.*

The record accordingly stands thus. There were three bodies of evidence relating to the question of reasonableness. These were, first, the Indiana-Illinois comparisons; second, the Wheeling cost study; third, the eastern comparisons. The Commission got rid of the Indiana-Illinois comparisons in the face of conclusive admissions as to their relevancy by inventing a "principle" that maximum reasonable rates in that territory should be lower than in Ohio notwithstanding similarity of conditions. It eliminated the Wheeling cost study by grossly exaggerating the effect of one criticism without any attempt to determine the effect upon the ultimate cost of its other criticisms. It accepted the eastern comparisons although many of them were drawn from districts where, as appears from its own repeated findings, transportation conditions are more severe than west of the Alleghenies. *State Corp. Comm. of Virginia v. Norfolk & W. Ry. Co.*, 190 I. C. C. 325, 342-343; *Staunton Brick Co. v. Chesapeake & O. Ry. Co.*, 190 I. C. C. 302, 321; *Danville Chamber of Commerce*

v. Chesapeake & O. Ry. Co., 191 I. C. C. 20, 26; *L. D. Wingfield-Hatcher Coal Co. v. Chesapeake & O. R. Co.*, 191 I. C. C. 644, 647. This treatment of the evidence was characterized by Commissioner Eastman as follows (R. 69):

> "Summing up the matter, my judgment is that the majority have given altogether insufficient weight to the evidence which is favorable to the Ohio rates and have accorded too much weight to the opposing evidence. I cannot, therefore, accept the conclusions which have been reached."

But the Commission was not content to rest its conclusion against the reduced Ohio rates upon the evidence, even after all this violence had been done to it. It invoked, as we shall see, a presumption against the legality of the Ohio rates which, in practice, is irrebuttable. We submit that the Commission would not have resorted to such a measure for any reason less compelling than that its predetermination of the question could not be supported otherwise.

THE RESORT TO THE PRESUMPTION.

It is perfectly apparent from the report that the majority of the Commission were conscious of all the infirmities of the case against the Ohio rates. But they had entered upon the investigation resolved to raise the Ohio rates, and they were aware of the necessity for findings of fact upon which to sustain the intended order. After all the talk about alleged categories of error in the Ackerman comparisons, and the remarkable result of its undisclosed recalculation of the Wheeling costs, there still remained the Commission's own mileage scale prescribed for the determination of maximum reasonable rates in Indiana-Illinois scale territory, the opposing carriers' tacit admission of comparable operating conditions in the two regions, and their complete failure to prove any greater operating costs than those submitted by the Wheeling. The facts shown and the failure of ad-

verse parties, with complete information, to show facts stood squarely in the way of the Commission's predetermination to raise the Ohio rates. The positive evidence offered against the Ohio rates was too trivial to support the necessary findings and so, failing anything else, a monstrous principle of evidence was discovered.

In the summary of the report, after pages of discussion of the evidence had made it clear that the only substantial proofs in the case upheld the Ohio rates, the Commission said (R. 63):

> "Under such circumstances and in view of the closely woven relationships of these rates under which the industry in this territory has been fostered, and particularly the present economic condition which also has affected the railroads adversely, only the most convincing evidence would warrant the disruption of the long existing relationship of rates or the reduction of the interstate rates. That convincing proof does not appear on the present record."

That is to say, the Commission, driven by the necessity of supporting its predetermination to raise the Ohio rates, and conscious of the weakness of the evidence upon which it had to act, devised a presumption against the legality of the Ohio rates of an unparalleled severity.

It will doubtless be pointed out by our adversaries that the Commission does not use the word "presumption" in this connection. It will be contended further that what required the most convincing evidence was not a presumption but an inference; that is, that it arose from evidence and not before the evidence. But the conclusion of the Commission does not arise like an inference from the play of logic upon fact but rather from certain *a priori* theories predicated upon extraneous considerations. This appears from an examination of the context of the Commission's statement.

The summary of the report, in which the "circumstances" relied upon are set forth, shows the first "circumstance"

relied upon by the Commission to support its conclusion that only the most convincing evidence would avail to save the Ohio rates is the financial distress of the coal producers and the railroads. In its summary the Commission says (R. 62):

> "The use of substitute fuels adds to the coal producer's difficulty while substituted modes of transportation are reducing the revenues of the railroads. Not only is the truck being used to affect the railroads' revenues adversely but the barge lines in the very territory here under consideration are displacing much railroad tonnage by use of the waterways. The volume of coal trucked for short distances in the mining districts of Ohio is shown in a few instances. Apparently this form of competition is increasing as good roads are being built."

The fact that producers of coal are suffering from the competition of other fuels and that the railroads are suffering from the competition of other modes of transportation does not *logically* tend to support the proposition that only the most convincing evidence can justify rate reductions. The fact *logically* tends the other way. It indicates that if the coal producers and the railroads are to be saved from even greater difficulty the cost of coal hauled by rail to the point of consumption must be reduced. It is only upon some consideration of an *a priori* and mystical nature that the competitive disadvantages of mine owners and railroads can be used to support the principle that reduced rail rates on coal can only be justified by the most convincing evidence. Therefore, in so far as the burden imposed upon us is predicated upon the competitive disadvantages of coal producers and railroads, it partakes of the nature of a presumption and not an inference.

The second circumstance upon which the Commission relies is the fact that before the Ohio reductions coal moved freely to the destinations in question, both from the Ohio fields and from the crescents. But this does not *logically*

support the conclusion that the old level of intrastate rates and the existing level of interstate rates are reasonable. The destinations in question are great industrial centers. The population is large and the winters are severe. Coal would undoubtedly move in great volume into this territory under rates far above the level of reasonableness.

The final circumstance relied upon to support the principle is certain rate relationships, said to be of great age, under which persons have been induced to develop, at great expense, coal fields remote from the destinations in question, relying upon the existing rate relationships to guarantee them entrance into northeastern Ohio. Again we find that the fact relied upon does not *logically* support the conclusion that only the most convincing evidence can justify a reduction in the Ohio rates, without the intervention of extraneous economic and political theories. To make it do so it must be assumed that it is sound economics to keep distant sources of fuel open to consumers at the destinations in question, even at the cost of penalizing nearer districts with high freight rates. It must be further assumed that it is one of the functions of the Interstate Commerce Commission to determine from what districts and in what proportions a great industrial center must derive its coal supply. That is to say, reliance is placed upon economic and political theory to justify the imposition of the burden upon the State. We, therefore, most respectfully submit that the Commission has been able to accomplish its purpose of raising the Ohio rates only by means of invoking a presumption that the State of Ohio has been abusing its sovereign power to regulate its internal freight rates to the prejudice of the national interest. If the principle can be justified at all, it must be justified as a presumption.

But it cannot be justified as a presumption. Enough has been said already to show that it finds no justification either in the competitive disadvantages which mine operators and railroads in the territory involved are experiencing, or from the fact that coal did move from all the districts be-

fore the Ohio rates were reduced. The only remaining justification asserted by the Commission is that the reduction of the Ohio rates disturbed long standing relationships with interstate rates to the same destinations. We therefore pass to a consideration of the validity of that justification.

It is not disputed that the Ohio rates attacked before the Commission were at a lower level than the previous Ohio rates, and that their reduction increased the differentials in favor of Ohio at the destinations here in controversy. No one contends, we suppose, that any presumption of illegality arises from the fact that a State has exercised its undoubted power to lower its intrastate freight rates. *Home Telephone Co. v. Los Angeles*, 211 U. S. 265, 281. But it will seldom happen that an intrastate freight rate can be reduced by the independent action of State authority without some prejudice* to interstate commerce. There are few commodities of any economic importance which move to markets within any given state wholly from points of origin within that state. In a state of the geographical magnitude of Ohio, interior points may no doubt be found where the entire supply of such low-grade commodities as sand, gravel and industrial wastes such as cinders and slag, may be derived from domestic sources. We suppose that in states of the area of Texas and Montana the list would be extended, while in Rhode Island, Connecticut, New Jersey and Delaware it would be contracted. Normally, however, any reduction in a state rate of any economic importance will result in the disturbance of a competitive balance which extends into interstate commerce and in a greater or lesser degree will prejudice interstate commerce. But, if the mere exercise by the State of its power to reduce intrastate rates will not be presumed to be unlawful, no such presumption should arise from the further fact of prejudice to interstate commerce, which we have seen normally attends the exer-

*In this discussion we use the term "prejudice" as distinguished from undue prejudice.

cise of the State's power to reduce. The question still remains whether the state rates are illegal, that is, whether the new relation is an improper one, and if it is, whether the fault is with the state rates.

In the instant case the Ohio interests did not contend that the new relation between the Ohio rates and the western Pennsylvania rates was correct. They contended before the Commission and in this suit in equity that the western Pennsylvania interstate rates should be measured by the same yardstick invoked for the measuring of the Ohio rates, which would have had the effect of reducing the majority of them, and that the discriminations against western Pennsylvania were therefore the fault of the interstate rates. In this contention they were joined before the Commission by the western Pennsylvania coal operators, who, however, in this suit aligned themselves and now stand on the other side.

We submit that in a controversy under section 13 (4) of the Interstate Commerce Act no presumption arises that any resulting prejudice to interstate commerce is the fault of the State rates. *Florida v. United States,* 282 U. S. 194, 212. The question is at large and the persons invoking the aid of federal authority to correct an alleged evil in the State's exercise of an undoubted general constitutional power over its own freight rates have the burden of showing whatever is necessary to justify the exertion of the extraordinary and exceptional federal power over commerce moving wholly within the limits of a state. *Home Telephone Co. v. Los Angeles,* 211 U. S. 265, 281.

Nor do the relationships between state and interstate rates acquire sanctity from their age. Nobody, no matter how extensive his investments under the influence of a given rate level or rate relationship, can acquire any prescriptive right to its maintenance. There are no easements in rate levels or rate differentials. *So. Pacific Co. v. Interstate Comm. Comm.,* 219 U. S. 433. If any such prescriptive rights were indulged, the process of rate mak-

ing, either by State or federal authority, would be impossible. Long before any regulatory body could cover the entire field of freight rates within its jurisdiction and establish reasonable levels and relationships, its hand would be stayed by the fact that people had invested their money under the influence of and in reliance upon existing levels and relationships, which could not be disturbed without fully compensating all who might suffer.

Moreover, the presumption indulged is, we submit, of a severity unknown to the law. Even the presumption of innocence in capital cases need be rebutted only beyond a reasonable doubt. Men have suffered, and doubtless will suffer, the penalties of the criminal law upon evidence that satisfies judges and juries but falls short of being "the most convincing proof." Juries have convicted and judges have sentenced, for example, on purely circumstantial evidence which would undoubtedly have been more convincing if supported by the testimony of reliable eye-witnesses to the fact. No court with jurisdiction to review the legality of an order of the Commission is bound by any fact found and findable only by the invention of a presumption offensive alike to well settled rules of evidence and to the sovereign dignity of the State of Ohio.

To summarize, we have shown that the Commission undertook the investigation with the announced intention of condemning the Ohio rates and prescribing higher rates in lieu thereof; we have shown the insuperable difficulties which the Commission encountered in trying to arrive at its predetermined conclusion from the evidence; we have shown that, failing the possibility of a satisfactory conclusion on the evidence, the Commission devised a presumption which is without precedent in the law and which constitutes an unjustifiable invasion of the sovereignty of the State of Ohio. This conduct and disposition of the investigation constituted a denial of the hearing without which the Commission was powerless to make an order.

II.

THERE IS NO EVIDENCE TO SUPPORT THE ALLEGED FINDING OF THE INTERSTATE COMMERCE COMMISSION THAT THE RESTORATION OF THE STATE RATES REQUIRED BY IT IS NECESSARY TO AVOID UNDUE PREFERENCE AND PREJUDICE BETWEEN PERSONS AND LOCALITIES. IN FACT IT DID NOT REQUIRE SUCH RESTORATION FOR THAT PURPOSE, BUT FOR THE WHOLLY UNLAWFUL PURPOSE OF REESTABLISHING A RELATIONSHIP BETWEEN COMPETITIVE TRADE AND INDUSTRY INSIDE AND OUTSIDE THE STATE OF OHIO.

(Assignments of Error I, II, III, IV, VI, VII, VIII, XII, XIII, XVI, XVII, XIX, XXI)

The sole ground on which the District Court upheld the Commission's order was that it was valid as a requirement for the removal of undue preference and prejudice as between persons and localities in intrastate and interstate commerce. (R. 469) Under this point we shall discuss the question whether the order of the Commission, so regarded, was supported by proper findings, and further whether such findings, if made, were supported by substantial evidence. It should be noted that the question relates not merely to the condemnation of the rates investigated but also to the prescription of the rates required. As to this question we say, first, that the Commission did not make the findings necessary to support its order and, second, that on the evidence it could not have made such findings.

In determining the adequacy of the findings the Court is not confined to the formal conclusion of fact stated by the Commission. The mere statement of the ultimate fact in the language of the statute is not sufficient. *Florida v. United States*, 282 U. S. 194, 213. Such a statement, if contrary to the specific facts found by the Commission, is not to be taken as an independent finding of fact but as a conclusion of law not binding on the Court. *United States v. New York Central R. R.*, 263 U. S. 603, 609-10. An order regular on its face may be set aside if made to accomplish

a purpose not authorized, *New England Divisions Case*, 261 U. S. 184, 189, and the Court will go behind the mere formal conclusions of the Commission to ascertain the substance of its action and the facts and principles of law on which that action was based. *So. Pacific Co. v. Interstate Comm. Comm.*, 219 U. S. 433, 442-443.

We accordingly turn to the report to determine the adequacy of the Commission's findings in the light of these principles. As might be expected, it states (R. 64), in the language of the statute, that the intrastate rates are unduly preferential of Ohio shippers and localities and unduly prejudicial against interstate localities and shippers and further that such undue preference and prejudice should be removed by the establishment of rates no lower than the specific rates in effect immediately prior to August 1, 1932. When the body of the report is examined, however, it is found that the necessary evidentiary findings are not only entirely lacking but are replaced by findings that demonstrate the error of the ultimate finding. These are as follows:

> "The rate adjustment in the territory under consideration is the result of carrier and commercial competition over a long period of years together with the demands of consumers for particular grades of coal, and in some instances decisions of this commission. Mining properties outside the State of Ohio have been located and developed with heavy investments in facilities under the rate relationships existing prior to the reductions in the State of Ohio, and these properties are now being financially and physically seriously affected. One of the complainants has become bankrupt since the filing of its complaint, and others are on the verge of disaster." (R. 61-62)

> "The record fully establishes that coal has moved freely between Ohio points prior to the reduction in rates in northeastern Ohio. This is significant. We are asked to prescribe reasonable rates from the Pittsburgh and certain other groups to northeastern Ohio as well as to remove undue prejudice against interstate

coal producers and unjust discrimination against interstate commerce. Under the circumstances here presented such rates should be determined with great regard for the value of the service to the shipper and the existing competitive conditions. Distance has never been made the sole measure of these rates. If such a measure were to govern the farther distant groups would be unable to compete and the present relationships would be disrupted. These relationships, in general, have been in existence for many years, and counsel assert, even before this commission was organized.

"Any change in the rates from these origin groups would disturb the adjustment involved in this proceeding." (R. 62)

"Appendix B clearly indicates that in normal times coal moves freely from the inner and outer crescent districts to northeastern Ohio in substantial volume, and indeed, under abnormal conditions a very substantial movement of coal from these origins moved to Cleveland and other destinations in the same territory prior to the reduction in the Ohio rates. The interstate rates assailed as unreasonable prior to the Ohio reductions, did not prevent a substantial movement of coal to these Ohio destinations greatly in competition with Ohio mines." (R. 62-63)

The foregoing quotations are all taken from the Commission's own summary of the facts upon which it acted. They are not mere casual statements, the meaning of which would be modified by the context or by a reading of the report as a whole. They present fairly and fully the grounds for the formal findings. Restated briefly those grounds were that the rate adjustment involved was the result of the interplay of competitive forces over a long period of years; that heavy investments in mining properties made outside the state of Ohio in reliance on the former rate relationships are being seriously affected by the Ohio reductions; that coal moved freely between Ohio points prior to the reductions; that in removing undue prejudice against interstate coal producers the rates should be determined with great regard for the value of the service to the

shipper and existing competitive conditions; that distance has never been the sole measure of these rates; that if it were the relationships that have been in existence since before the organization of the Commission would be disrupted with the result that the farther distant groups would be unable to compete; and that there was a substantial movement of coal to the destinations involved from the interstate districts before the Ohio reductions. On these facts the Commission found that "only the most convincing evidence would warrant the disruption of the long existing relationship of rates", and that such proof did not appear. (R. 63)

It will be noted immediately that the facts found are silent on the most essential element of undue preference and prejudice, namely, a substantial disparity as between rates and service. There is not a word here to the effect that the old competitive relationship required to be restored would fairly measure the relative service rendered to the competing state and interstate shippers. There is no reference to transportation conditions, no reference to ton-mile earnings and no reference to distance, except to reject it. The sole criterion invoked is the prescriptive right of interstate shippers to a competitive adjustment asserted to be older than the Commission.

Such a showing is legally insufficient to establish *undue* preference and prejudice. That offense can be predicated only upon a disparity in rates that is not warranted by differences in service. This is clear from the decision of this Court in the case in which it first passed upon the federal power to prohibit and remove undue preference and prejudice between state and interstate shippers. *Houston & Texas Ry. v. United States*, 234 U. S. 342. The Court first discussed the question whether Congress possessed such power and concluded as follows (p. 353):

> "We find no reason to doubt that Congress is entitled to keep the highways of interstate communication open to interstate traffic upon fair and equal terms. That an unjust discrimination in the rates of a

> common carrier, by which one person or locality is unduly favored as against another *under substantially similar conditions of traffic*, constitutes an evil is undeniable; and where this evil consists in the action of an interstate carrier in unreasonably discriminating against interstate traffic over its line, the authority of Congress to prevent it is equally clear. It is immaterial, so far as the protecting power of Congress is concerned, that the discrimination arises from intrastate rates as compared with interstate rates. The use of the instrument of interstate commerce in a discriminatory manner so as to inflict injury upon that commerce, or some part thereof, furnishes abundant ground for Federal intervention. Nor can the attempted exercise of state authority alter the matter, where Congress has acted, for a State may not authorize the carrier to do that which Congress is entitled to forbid and has forbidden." (Emphasis ours.)

The Court then passed to the question whether this power had been delegated to the Commission and found that it had been. In describing the Commission's finding, which it held to be within its power, the Court said (p. 358):

> "Here, the Commission expressly found that unjust discrimination existed *under substantially similar conditions of transportation* and the inquiry is whether the Commission had power to correct it." (Emphasis ours.)

In the more recent case of *Commission v. Texas & N. O. R. Co.*, 284 U. S. 125, the Court described the Commission's findings, which it held adequate, as follows (p. 135):

> "In the course of the Commission's report it is said that the disparity between the two scales is bound to operate as a real discrimination against, and obstruction to, interstate commerce, and result in interstate shippers being unduly prejudiced and interstate commerce unjustly burdened. And in its ultimate findings the Commission states that the intrastate rates to

> the extent that they are lower, *distance considered,* than corresponding interstate rates would result in undue preference and advantage to shippers and receivers of freight in intrastate commerce within western Louisiana and in undue prejudice to shippers and receivers of freight in interstate commerce between points in Arkansas, Oklahoma and Texas and points in western Louisiana, * * *." (Emphasis ours.)

In resting its conclusion upon its conviction, however honestly held, that the commercial welfare of the interstate producers and the carriers required the preservation of the delicately balanced competitive rate structure which antedated its own establishment, the Commission undoubtedly exceeded its powers. That this is so is clearly established by *Anchor Coal Co. v. United States,* 25 F. (2d) 462,* in which a statutory district court enjoined an order of the Interstate Commerce Commission condemning proposed reduced rates from the south on lake cargo coal. The court said (p. 471):

> "We think that the enforcement of the order here complained of should be enjoined: (1) Because the Commission exceeded its powers, *in that its action was based, in part, at least, upon industrial conditions, and was essentially an effort to equalize industrial conditions or offset economic advantages through adjustment of rates;* * * *." (Emphasis ours.)

Elaborating this point, the court continued (p. 472):

> "The Commission does not have the right, however, to regulate industrial conditions under the guise of regulating rates. * * *
>
> "As pointed out above, for the Commission to fix rates upon such a basis is for it to assume the task of equalizing industrial conditions through rate adjustments. We do not think that Congress could give such

*Reversed as moot, *United States v. Anchor Coal Co.*, 279 U. S. 812, but cited with approval on the present point in *Texas & Pacific Ry. Co. v. United States*, 289 U. S. 627, 638, referred to *infra*, p. 34.

power to the Commission. *Hammer v. Dagenhart,* 247 U. S. 251. We are perfectly certain that it has not attempted to do so."

The Court then enumerated the Commission's powers over rates, and continued (p. 472):

> "But nowhere is it provided that in doing so the Commission may prefer one section of the country over another, or that it may fix rates, or may prevent the fixing of rates by the carriers, *with a view of placing competing producers upon an equality or of compensating for disadvantages under which competing communities may labor.* Manifestly such a power is not conferred by the statutes referred to, for rates fixed with such an end in view are not 'reasonable,' but are unreasonable and constitute an unprecedented interference with the industrial conditions of the country." (Emphasis ours.)

Our entire position on this matter was succinctly stated by this Court in *Texas & Pacific Ry. Co. v. United States,* 289 U. S. 627, in the following language (p. 637):

> "While the carriers may, therefore, meet competition by equalizing rates or maintaining differentials both to interior points and to ports, they may not adjust their rates with the motive of injuring or aiding a shipper, a particular kind of traffic, or a locality, *for so to do is to depart from the transportation standard, conformity to which the Act contemplates, and substitute others which are prohibited.* A tariff published for the purpose of destroying a market or building up one, of diverting traffic from a particular place to the injury of that place, or in aid of some other, is unlawful; and obviously, what the carrier may not lawfully do, the Commission may not compel. *Southern Pac. Co. v. Interstate Commerce Comm'n,* 219 U. S. 433, 444; *Interstate Commerce Comm'n v. Diffenbaugh,* 222 U. S. 42, 46; *Ellis v. Interstate Commerce Comm'n,* 237 U. S. 434, 445; *United States v. Illinois Central R. Co.,* 263 U. S. 515, 524; *Atchison T. & S. F. Ry. v. Interstate Commerce Comm'n,* 190 Fed. 591; *Anchor Coal Co. v. United States,* 25 F. (2d) 462, 471." (Emphasis ours.)

Later in the same opinion, discussing the prohibitions of the Interstate Commerce Act, including particularly unlawful prejudices and discriminations, the Court said (p. 638):

> "The standards it establishes are transportation standards, not criteria of general welfare."

The Court here explicitly recognizes the principles upon which our position in this case rests. It recognizes that the Act requires the observance of the transportation standard; that it prohibits the substitution of any other criterion; and that a tariff directed at the destruction of one market or the building up of another or intended to divert traffic from one place to its injury or in aid of some other place, is unlawful whether initiated by the carriers or by the Commission. The increased Ohio rates which the Commission has required, with the support of some carriers but against the earnest protest of the Wheeling, violate all of these requirements: they do not conform to the transportation standard; they are based wholly on competitive considerations; and they are intended to destroy the markets for Ohio coal and divert coal tonnage from the Ohio to interstate districts. They rest exclusively on the "criteria of general welfare" condemned by the Court.

We do not make these strictures upon the Commission's action lightly or carelessly. An examination of the record will show that the rate relations required to be restored by the Commission are wholly out of harmony with the transportation standard. The Commission found that transportation conditions from the Ohio producing districts and from the interstate producing districts to northeastern Ohio are substantially the same mile for mile. (R. 35.) It found the distances from each producing district to each northeastern Ohio destination. (R. 70-73.) It had before it evidence of the coal mileage scale prescribed by it in Illinois and from Indiana to Illinois for the purpose of re-

moving undue prejudice against interstate commerce. (I. C. C. Exhibit 250; Vol. III, Exhibits before I. C. C., p. 294.) Here was all the material necessary to test the rate relations prescribed by the Commission by the transportation standard. *But the Commission did not even attempt to justify its action by this test.* It ignored it in favor of long established commercial custom. Had it applied the transportation test it could not have arrived at its conclusion. This is obvious from the following simple comparison prepared from the Commission's own findings:

TO CLEVELAND

From	Miles	Ind.-Ill. Scale Rate	Rate Fixed
Ohio No. 8	128.2	$1.40	$1.74
Pittsburgh	162.0	1.65	1.84
Connellsville	216.4	1.85	1.90
Fairmont	247.0	1.94	1.99

For present purposes it is immaterial whether the Indiana-Illinois scale is too low for this territory. If it is, it produces smaller differences in rate for differences in distance than would be proper under the transportation test. Under that scale Ohio No. 8 would have a rate to Cleveland 25 cents lower than Pittsburgh, 45 cents lower than Connellsville and 54 cents lower than Fairmont, whereas the Commission, by applying the doctrine of prescription, has imposed upon Ohio No. 8 a rate to Cleveland only 10 cents lower than Pittsburgh, only 16 cents lower than Connellsville and only 25 cents lower than Fairmont. It is for this reason that we say that the evidence not only fails to support the Commission's finding of undue preference and prejudice between persons and localities but compels an opposite conclusion.

The Commission's treatment of two particular situations brings into sharp relief its blind insistence on the *status quo ante* regardless of the evidence, and justifies brief separate consideration. We refer to the rates from Ohio No. 8 to Canton, Massillon and Akron, Ohio, and the rate from

Cambridge to Mansfield, Ohio. The rates from Ohio No. 8 to Canton, Massillon and Akron never had any traditional relation to the rates from the Pittsburgh or other interstate districts and have been fixed from time to time without regard to them (R. 1244-1248), as the carriers conceded (R. 571-572, 573). In the face of this showing the Commission compelled the Ohio No. 8 rates to those points to be increased for the sole reason that rate relationships of long standing, in reliance on which interstate producers had made heavy investments, should not be disrupted. As applied to these rates the facts upon which the Commission relied in making its ultimate finding were shown by the uncontradicted evidence of both sides not to exist.

The Commission's treatment of the Cambridge-Mansfield rate involved an even more flagrant disregard of the evidence. That rate was fixed by the Public Utilities Commission of Ohio in its No. 7036, *Empire Steel Corp. v. B. & O. R. R. Co.*, the report in which is attached to the original petitions in the District Court as Exhibit D. (R. 122-144) That report shows that the purpose and effect of that decision was simply to remedy a local discrepancy in the Ohio adjustment. It was unrelated to the other Ohio reductions and would and should have been made even if they had never been thought of. *It conformed the Mansfield rate to other intrastate rates that were not reduced and were not in issue before the Interstate Commerce Commission.* But the Commission acted in such complete disregard of the evidence that it did not except even this rate from the sweep of its mandate. It set aside every order of the Ohio Commission that was brought to its attention.*

Errors such as these are fatal to the order. Their effect cannot be escaped by saying that appellants should apply to the Commission for relief or by a saving clause in the Commission's order, if there were one. This exact question

*On this point see separate brief filed in behalf of Empire Sheet & Tin Plate Company, appellant herein.

was considered and disposed of in *Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co.*, 257 U. S. 563. The Commission had made an order requiring all intrastate passenger fares in Wisconsin to be increased to the interstate level and the first question was whether it could be supported as a removal of undue preference and prejudice as between persons and localities. The Court held that as to a large class of rates the order was justified, but that it was unsupported as to others and that it was therefore bad *in toto*. The Court said (pp. 579-580):

> "First. The report and findings of the Commission undoubtedly show that the intrastate fares work an undue discrimination against travellers in interstate commerce and against localities (*Houston, East & West Texas Ry. Co. v. United States*, 234 U. S. 342) in typical instances numerous enough to justify a general finding against a large class of fares. In a general order thus supported, possible injustice can be avoided by a saving clause allowing any one to except himself from the order by proper showing. This practice is fully sustained by precedent in what was done as a sequence of the *Shreveport Case* (*Houston, East & West Texas Ry. Co. v. United States, supra*). See 34 I. C. C. 472; 41 I. C. C. 83; *Eastern Texas R. R. Co. v. Railroad Commission*, 242 Fed. 300; *Looney v. Eastern Texas R. R. Co.*, 247 U. S. 214. In *Illinois Central R. R. Co. v. State Public Utilities Commission*, 245 U. S. 493, 508, this court indicated its approval of such practice which was adopted by the Commission. 49 I. C. C. 713. Any rule which would require specific proof of discrimination as to each fare or rate and its effect would completely block the remedial purpose of the statute.
>
> "The order in this case, however, is much wider than the orders made in the proceedings following the *Shreveport* and *Illinois Central Cases*. There, as here, the report of the Commission showed discrimination against persons and localities at border points, and the orders were extended to include all rates or fares from all points in the State to border points. But this order is not so restricted. It includes fares between all in-

terior points although neither may be near the border and the fares between them may not work a discrimination against interstate travellers at all. *Nothing in the precedents cited justifies an order affecting all rates of a general description when it is clear that this would include many rates not within the proper class or the reason of the order. In such a case, the saving clause by which exceptions are permitted, cannot give the order validity.* As said by this court in the *Illinois Central R. R. Case,* 'it is obvious that an order of a subordinate agency, such as the Commission, should not be given precedence over a state rate statute otherwise valid, unless, and except so far as, it conforms to a high standard of certainty.' See also *American Express Co. v. Caldwell,* 244 U. S. 617, 627." (Emphasis ours.)

Even if it could be said that the doctrine of prescription invoked by the Commission justified its order as to certain of the Ohio rates, it would be impossible to sustain it as to the particular rates just discussed. They never bore any traditional relationship to interstate rates and the doctrine of prescription could not apply to them. For this reason alone the order must fall.

While we contend that the order is bad as to these particular rates and is therefore invalid as a whole, our principal purpose in referring to them is to illustrate the Commission's obsession with a restoration of the *status quo* and its complete disregard of the only evidence that could justify its action, namely, that dealing with transportation conditions.

Before leaving this question we desire to refer briefly to the comments of the court below upon the evidence as to discrimination against persons and localities in interstate commerce, which are as follows (R. 470):

> "Nor do we think that it can be disputed, upon the present record, that there is substantial evidence to support the finding of discrimination against persons and localities, if not, in fact, a demonstration of the

correctness of that finding. It is urged that the Commission erred in placing the burden of proof upon the plaintiffs to show that the intrastate rates were not unduly preferential to Ohio persons and localities, and unduly prejudicial to persons and localities in other states. We cannot concur. A question of where lies the burden of proof can be of serious moment only when the evidence is in a state of equipoise. Here, with all the evidence before it, the Commission found that the intrastate rates were unduly preferential of Ohio shippers and localities and unduly prejudicial against interstate localities and shippers in Pennsylvania and West Virginia. There was no question of the burden of proof presented, for, as we have said, this was practically the only conclusion at which the Commission could have arrived."

The court does not specify what evidence seemed to it to have such conclusive effect. We assume that the court believed with the Commission that its duty was to protect the vested interest of interstate shippers and carriers in the *status quo*. If our opponents think otherwise they will doubtless set out the evidence which they think the court thought required the conclusion at which the Commission arrived.

III.

THE INTERSTATE COMMERCE COMMISSION EXCEEDED ITS AUTHORITY IN REQUIRING STATE RATES TO BE RAISED WITHOUT HAVING FIRST FOUND OR MADE REASONABLE ALL SUBSTANTIALLY COMPETITIVE INTERSTATE RATES TO THE SAME DESTINATIONS, BECAUSE IN SO DOING IT EXPOSED INTRASTATE COMMERCE TO UNJUST DISCRIMINATION IN RELATION TO COMPETITIVE INTERSTATE COMMERCE ENJOYING LOWER RATES WHICH THE COMMISSION FAILED AND REFUSED TO PASS UPON.

(Assignments of Error I, II, III, IX, XII, XVI, XVIII, XXI)

For the purpose of this point it is necessary to recall the essential characteristics of the rate adjustment on bituminous coal to northeastern Ohio as shown on the map at

the opening of this brief. The origin districts lie in eastern and southern Ohio and in a rough arc extending from western Pennsylvania through western Maryland, West Virginia, western Virginia and eastern Kentucky into eastern Tennessee. The districts along the inner edge of this arc are called the inner crescent and those along the outer edge the outer crescent. Classifying them differently, those in western Pennsylvania, western Maryland, and northern West Virginia are called the northern crescents, and those in southern West Virginia, western Virginia, eastern Kentucky and eastern Tennessee the southern crescents. The districts from which the Commission fixed intrastate rates in this case are the principal Ohio districts, namely, Ohio No. 8, Middle, Massillon, Cambridge, Crooksville, Hocking and Pomeroy. (R. 76) Those from which it approved the interstate rates as reasonable are the principal districts in the *northern* part of the *inner* crescent, namely, Pittsburgh, Freeport, Connellsville and Fairmont. (R. 64) The rates from the districts in the outer crescent and from the districts in the southern part of the inner crescent were not passed upon at all,—they were simply ignored. The omitted interstate districts which in the aggregate are of great territorial extent and many of which, as will hereafter appear, are of great commercial importance in northeastern Ohio, are Altoona, Meyersdale, Cumberland-Piedmont, Belington, Gauley, Ohio River, Kanawha, New River, Pocahontas, Tug River, Thacker, Kenova, Kentucky, Big Sandy, Clinch Valley No. 1, Clinch Valley No. 2, Stonega, McRoberts, Hazard, Harlan-Jellico, Pine Knot and Rathburn. The territorial extent of the Ohio and interstate districts from which the rates were fixed or approved and of those from which the rates were not passed upon and the pattern of the adjustment as a whole are shown on the map. Most of these districts are strongly competitive with one another in northeastern Ohio. As to this the Commission found (R. 24-25):

> "Northeastern Ohio is served principally by the Pennsylvania, the New York Central, the Baltimore & Ohio, the Wheeling and the Nickel Plate-Erie system. All of these carriers participate both in the rates and the transportation of bituminous coal from Ohio mines as well as from the inner and outer crescent mines to northeastern Ohio."

and further (R. 27):

> "Steam and domestic coal from western Pennsylvania, Virginia, West Virginia, and eastern Kentucky is shipped to northeastern Ohio in competition with Ohio coal."

and in the summary of its report the Commission said (R. 62-63):

> "Appendix B clearly indicates that in normal times coal moves freely from the inner and outer crescent districts to northeastern Ohio in substantial volume, and indeed, under abnormal conditions a very substantial movement of coal from these origins moved to Cleveland and other destinations in the same territory prior to the reduction in the Ohio rates."

These findings have full and explicit support in the evidence before the Commission (R. 679, 681-682, 684-686, 689-690, 692, 801, 851-855, 1047-1048, 1050-1051; I. C. C. Exhibits 50 and 125, Vol. II, Exhibits before I. C. C., pp. 119 and 290).

In this connection the Court should also know that while all crescent coals compete with Ohio coals in northeastern Ohio, the latter are suitable only for steam and domestic purposes and are inferior for those purposes to all interstate coals. On the other hand, interstate coals from a portion of the Pittsburgh district, from the Connellsville district and from both the high volatile and low volatile districts of southern West Virginia and eastern Kentucky are, generally speaking, suitable for special purposes, such as by-product coking, for which the Ohio coals are not

suitable. In general, the competitive disadvantage of the interstate fields in northeastern Ohio markets due to their distance is offset by the preference of users for the quality of this coal. (R. 1017, 1019-1020, 1212-1213)

In the light of these facts we say that the Commission exceeded its authority in requiring the Ohio rates to be raised to the level of *a selected portion only* of the competitive interstate rates, because the portion selected for this purpose does not truly represent the level of the competitive interstate rates as a body but comprises only the highest parts of an extensive system of rates that is made on the average principle, as a result of which (a) the Ohio rates were forced to a level materially higher than the true interstate level, and (b) Ohio commerce was exposed to the competition of interstate commerce on a lower rate level that was ignored in fixing the Ohio rates. The seriousness of this situation will be immediately apparent. The federal government invades the sovereign domain of a State under its power, implied from necessity, to protect interstate commerce from injury by state rates and by a pretended exercise of that power which goes beyond the necessity exposes state commerce to injury by interstate rates. This unadorned statement of the effect of the Commission's action in this case should make plain the necessity for an intensive examination of the question, quite apart from the rule that whenver the federal power is exerted within what would otherwise be the domain of state power, the justification for the exercise of the federal power must clearly appear. *Florida v. United States*, 282 U. S. 194, 211.

We turn then to the first proposition, namely, that the Commission used as a measure of what the Ohio rates should be the highest level it could find within the interstate adjustment. The carriers' evidence before the Commission fully explained the characteristics of the structure. It showed that when all of these rates were increased by

the Director General in 1918 the "fixed differentials" as among the various producing districts were preserved (R. 567-569; I. C. C. Exhibits 8, 9, and 10; Vol. I, Exhibits before I. C. C., pp. 61, 71 and 77); and that the same method was pursued in connection with the 40 per cent increase of 1920 (R. 569-570; I. C. C. Exhibit 11; Vol. I, Exhibits before I. C. C., p. 84). The term "fixed differentials" as used in this connection was defined by the carriers as meaning "differences which remain the same in amount regardless of the level of the rates." (R. 569.) Upon this and other similar evidence of record the Commission made a number of findings concerning this structure, the most important of which are as follows:

> "Whenever comparisons are made between rates from differential groups with those from base groups or for short hauls where groups adjustments covering a wide territory are considered, an anomalous rate adjustment appears from the measure of distance." (R. 46-47)

> "As a rule the general changes in rates were applied on bituminous coal to the rates from the base groups and the differential relationships between mining groups were maintained to preserve the competitive conditions that existed prior to the changes." (R. 48)

> "Distance has never been made the sole measure of these rates. If such a measure were to govern the farther distant groups would be unable to compete and the present relationships would be disrupted. These relationships, in general, have been in existence for many years, and counsel assert, even before this commission was organized." (R. 62)

The extent to which this method of rate making has artificially distorted the rates to the prejudice of intrastate commerce cannot be better illustrated than by an instance which the Commission itself cites in the following passage from its report (R. 48):

"The Cleveland Chamber of Commerce, intervenor, also refers to the 70-cent rate from Pittsburgh district to Youngstown, found not unreasonable in Youngstown Sheet & Tube Co. v. P. & L. E. R. R. Co., supra, and points out that at that time the Middle-Coshocton-Massillon rate to Cleveland was also 70 cents. The average short tariff route in each instance is about the same, the former being 96.4 miles, and the latter 104 miles. This parity continued through the fifteen per cent increase in The Fifteen Per Cent Case, 45 I. C. C. 303, and until June 24, 1918, when both rates were 85 cents. Since that time and until the Ohio State reductions August 1, 1932, both of these rates were subjected to the same general changes *but the application of different methods resulted in a rate of $1.34 from Pittsburgh to Youngstown and $1.54 from the Middle-Coshocton-Massillon district to Cleveland.* (Emphasis ours.)

It is thus clear that in taking the interstate rates from Pittsburgh, Freeport, Connellsville and Fairmont districts *only* as a measure of the level of the Ohio rates the Commission selected but a few of an extensive system of interstate rates, the *average* level of all of which may be reasonable and proper but the *particular* level of any of which is not necessarily so. Such action is beyond the Commission's power under section 13 (4). It is a prerequisite to an order raising state rates that all the competitive interstate rates first be found reasonable or made reasonable by order and, when these interstate rates constitute a group, it is both "pertinent and necessary" that all the rates in the group be considered and be found or made reasonable. *Virginia Corporation Commission v. A. & R. R. R. Co.*, 136 I. C. C. 173, 181. The necessity of first finding the interstate rates reasonable was explicitly declared by this Court in *Georgia Comm. v. United States*, 283 U. S. 765, as follows (p. 770):

"It is true that when state rates are assailed on the ground that they result in undue prejudice to inter-

> state shippers or discriminate against interstate commerce, *the Commission must determine whether the existing interstate rates are reasonable,* as it may not require intrastate rates to be raised above a reasonable level. State Corporation Comm. v. Aberdeen & Rockfish R. Co., 136 I. C. C. 173, 180." (Emphasis ours.)

It is significant that the Court did not say that some of the existing interstate rates or the highest of the existing interstate rates must be found reasonable. The requirement clearly applies to all relevant interstate rates.

The basis for this doctrine is elaborated by the Commission in the *State Corporation Comm. case* cited by the Court in the foregoing passage. The Commission there said (136 I.C.C., at page 180):

> "We pass to the point which the interveners make with respect to the reasonableness of the rates in issue. Where the issue is under section 3 and only interstate rates are involved, we can make an order requiring the removal of undue prejudice without regard to the level of the rates. If in complying with such an order the carriers transgress section 1, the rates so filed can be suspended and dealt with accordingly. *Where the issue is between intrastate and interstate rates, however, and undue preference of intrastate shippers or commerce and undue prejudice to interstate shippers or commerce are shown, it is necessary in the first instance to determine whether or not the offence is caused by the intrastate or the interstate rates.* Plainly we can not require intrastate rates to be raised above a maximum reasonable level in order to cure a disparity with interstate rates, and where the intrastate rates have been fixed, as they have been here, by the order of a State commission, they can not be increased by the carriers without an order from us. This situation is recognized in paragraph (4) of section 13, which provides that where we find that any rate made or imposed by authority of any State *causes* any undue prejudice to persons or localities engaged in interstate

commerce or any unjust discrimination against such commerce, we shall prescribe the rate 'or the maximum or minimum, or maximum and minimum, thereafter to be charged', for the purpose of removing such prejudice or discrimination. *Obviously such an order can not be made without consideration of the reasonableness of the rates in issue.*" (Emphasis ours.)

This rule has been consistently followed by the Commission. Thus in *Memphis Freight Bureau v. Arkansas R. Co.*, 173 I. C. C. 555, the Commission said (p. 557):

"The relation here complained of is wholly between interstate rates, rules, regulations, and practices, on the one hand, and intrastate rates, rules, regulations, and practices imposed by State authority, on the other hand, and any unlawfulness that may exist therein is susceptible of correction by us *only in instances where the interstate rates, rules, regulations, and practices to which we require those applying intrastate to be related, are found by us to be reasonable.*" (Emphasis ours.)

And in *Omaha Chamber of Commerce v. Chicago & N. W. Ry. Co.*, 167 I. C. C. 417, the Commission said (pp. 427-428):

"As previously stated herein, before we can condemn intrastate rules, rates, or regulations as resulting in undue prejudice to interstate commerce, *we must have evidence enabling us to determine what is and will be the reasonable interstate basis.*" (Emphasis ours.)

Now, it is a necessary corollary of this rule that the Commission, to be warranted in requiring state rates to be conformed to interstate rates found by it to be reasonable, must determine the reasonableness of the interstate rates after hearing and upon evidence, since that is an essential part of the finding that the state rates *cause* undue prejudice. If the finding of reasonableness as to the interstate

rates is not supported by evidence the ultimate finding that the state rates cause undue prejudice falls.

In the case at bar the Commission found the interstate rates reasonable without evidence to support the finding, because it considered only the *highest* part of an interstate rate system which was made on the basis of the *average* reasonableness of the whole interstate adjustment and not on the basis of the *individual* reasonableness of each rate. This is clearly established by the evidence and findings already discussed. To repeat, the entire crescent adjustment has always been made and regulated so as to represent a reasonable *average* level, produced by some rates which, if individually considered, would be found too high, and by others which, if individually considered, would be found too low. Out of this structure the Commission selected the rates on the highest level (those from the nearest interstate districts) as representing the interstate level, which they do not in fact represent at all. And as a result the Commission erroneously found that the Ohio rates caused undue prejudice against interstate commerce and erroneously required them to be raised to a level higher than reasonable and higher than the true interstate level.

Our position on this point finds full support in the Commission's decision in the *State Corporation Comm. case* already referred to. The interstate rates there attacked were part of an extensive group adjustment. The evidence related only to the interstate rates attacked and ignored the balance of the interstate groups. On such a showing the Commission said that it could not make a thirteenth section order because it had no evidence before it of the level of the entire interstate adjustment, and announced that it would dismiss the complaint unless the record were properly supplemented. The Commission's description of the interstate adjustment was as follows (136 I. C. C., at pp. 179-180):

> "The situation is an unusual one. As has been indicated, group rates are in effect from Virginia cities to destination groups in North Carolina. * * *

"In many instances these groups give the Virginia cities the advantage of long hauls at rates which are relatively lower than the North Carolina intrastate rates. The distance rates which apply from the Virginia cities and which are here assailed tend to mitigate the disadvantage of the group rates in the case of the shorter hauls but do not impair their advantage in the case of the longer hauls.

* * * * * * * * *

"Clearly this scale [the distance rates] is coupled with and is in reality a part of the group adjustment. Its only purpose is to mitigate the harsher features of that adjustment. *If the group rates were attacked as unduly prejudicial to the Virginia cities, it would be necessary to consider their application to the longer as well as to the shorter hauls.* In the same way, it seems to us, this alternative scale must be considered in connection with the rates with which it alternates. One can not properly or justly be considered without the other." (Emphasis ours.)

That situation was identical in all essential respects with the facts in the case at bar. As to its power in dealing with such a situation under section 13 (4) the Commission said (136 I. C. C., at p. 181):

"We are faced, therefore, by a situation where complainants have attacked interstate rates as unduly prejudicial which are an integral and minor part of a group adjustment. Our previous expressions with respect to these alternative scale rates show clearly that they must so be regarded and treated. *If there were no such alternative rates and complainants had confined their attack to the group rates for the shorter hauls only, clearly we could not determine whether or not those particular rates are unduly prejudicial without consideration of the group rates in their entirety. This might, it is true, lead to the conclusion that the groups should be broken up or modified; but nevertheless such consideration would be both pertinent and necessary.* In our opinion it is equally pertinent and necessary where complainant confines its attack to alternative scale rates which constitute an integral part of a group ad-

justment and were designed for the sole purpose of mitigating its harsher features, so far as complainants are concerned." (Emphasis ours.)

The application of the principle of this decision to the facts in the instant case cannot be escaped. It disposes directly and conclusively of the question we are discussing. The complaints against the reasonableness of the interstate rates to northeastern Ohio which were heard with the Commission's investigation in No. 25566 confined their attack to the rates from the Pittsburgh, Freeport, Connellsville and Fairmont districts. These are "the group rates for the shorter hauls" embraced in the competitive interstate adjustment. Using the Commission's own language in the foregoing quotation, clearly it "could not determine whether or not those particular rates are unduly prejudicial without consideration of the group rates in their entirety."

We do not mean to say that the present form of the interstate groups, extending as they do from western Pennsylvania to eastern Tennessee, is proper, and that the only thing necessary for the Commission to do was to determine what is in fact the average level from all of these groups considered together. As pointed out in the *State Corporation Comm. Case,* the first question presented in the consideration of the entire group adjustment of interstate rates is whether "the groups should be broken up or modified". If it was found that they should be, it would then be necessary to fix reasonable rates from each of the modified groups. If it was found that they should not be broken up or modified, it would be necessary to approve or fix reasonable rates from the groups in their existing form. In the case at bar the Commission did neither. Since it wholly ignored the fact that the competitive interstate rates constituted a group adjustment, it did not pass upon the propriety of the groups nor upon the level of all the rates either collectively or individually.

The *State Corporation Comm. case* follows the universally recognized rule that the reasonableness of a group rate can be determined only by examining the whole group and determining first whether it is reasonable as a group and, if it is, by judging the rate on the basis of the average distance and average service from all parts of it. *Midcontinent Oil Rates*, 36 I. C. C. 109; *Brush Creek Mining & Mfg. Co. v. L. & N. R. R. Co.*, 39 I. C. C. 449; *Indiana State Chamber of Commerce v. B. & O. R. R. Co.*, 83 I. C. C. 591; *Class and Commodity Rates to Florida*, 142 I. C. C. 151. It makes it clear that the Commission cannot fix interstate rates of the kind here involved at a reasonable level except after receiving and weighing evidence as to all of the rates from all of the related groups. *This confessedly it did not do.* Its order is therefore invalid, not because it drew the wrong conclusion from the evidence, but because it had no evidence before it and made no finding on an essential question.

The error we are discussing goes much deeper than thus far stated and involves even more serious consequences. By reason of the fact that the only rates in the interstate adjustment which the Commission approved and used as a norm were the *highest* of the group rates, the Commission's order exposes intrastate commerce to the unfair competition of interstate traffic on the other lower interstate rates. We have already shown, and the Commission found, that the southern crescent districts are strongly competitive with the Ohio districts in shipping to northeastern Ohio. (*supra*, pp. 42-43) The evidence further showed that these lower interstate rates are *less than reasonable maximum rates* (R. 590, 690), and the Commission has itself so held. *Allied Paper Mills v. C. & O. Ry. Co.*, 183 I. C. C. 795;

Carnegie Steel Co. v. P. R. R. Co., 100 I. C. C. 353.* By reason of the Commission's order, therefore, Ohio traffic is compelled to pay more than maximum reasonable rates *while competitive interstate traffic to the same points is permitted to enjoy less than maximum reasonable rates.* The order *creates* undue preference and prejudice as between state and interstate shippers, leaving the Ohio carriers (such as the Wheeling) without the right, and the Ohio Commission without the power, to put an end to it.

This is not regulation of intrastate for the protection of interstate commerce; it is the arbitrary destruction of intrastate commerce. It goes beyond the necessities of the federal power and is therefore void, for that power extends only so far as is essential to protect, and not to the extent of preferring, interstate commerce. *Houston & Texas Ry.*

*The extent to which the interstate rates, especially the southern rates, are lower than the rates prescribed by the Commission in Ohio is shown by the following table in which the information with regard to the Ohio No. 8, Pittsburgh, Connellsville and Fairmont Districts is taken from Appendix A of the Commission's report (R. 70-73) and the information with regard to the southern districts is taken from I. C. C. Exhibit 332, Vol. IV, Exhibits before I. C. C., page 4.

TO CLEVELAND

From	Miles	Rate Per Ton	Mills Per Ton Mile
Ohio No. 8 District	128.2	$1.74	13.57
Pittsburgh District	162.0	1.84	11.36
Connellsville District	216.4	1.90	8.78
Fairmont District	247.0	1.99	8.06
Southern $2.39 rate Districts (shown on frontispiece as Kanawha, Kenova, Thacker, Kentucky, Big Sandy, Hazard, McRoberts, Harlan-Jellico, Pine Knot)	408.4	2.39	5.85
Southern $2.64 rate Districts (shown on frontispiece as New River, Pocahontas, Tug River, Clinch Valley No. 1, Clinch Valley No. 2, Stonega, Rathburn)	426.4	2.64	6.19

v. United States, 234 U. S. 342, 355; *Florida v. United States*, 282 U. S. 194, 211.

That the Commission's order does in fact do what we assert is clear from the testimony of Dr. Charles Reitell, an expert witness employed by the Public Service Commission of Pennsylvania to make special studies of bituminous coal. He testified (R. 1121):

> "The bituminous coal industry of Pennsylvania is in very serious straits. The last two decades bear witness to an economic collapse in this, the major industry of the state. This soft coal disaster has fallen so heavily upon central and western Pennsylvania that untold suffering, misery and unemployment are blighting and have blighted these areas for years.
>
> "The Public Service Commission of Pennsylvania feels that this decline is due to a shift in the industry from the northern fields of Pennsylvania *and Ohio* to the southern fields of Virginia, Kentucky and southern West Virginia, and that this shift occurs in part *because of the freight rate structures that make possible mines, far distant from markets, able to so successfully compete with near-to-market mines as to drive them out of existence.* (Emphasis ours.)

It is apparent from this testimony that unless Ohio is permitted to escape from the unreasonable prejudice created by preferential rates from the southern fields it will suffer the same blighting effect as has been experienced in Pennsylvania.

The Public Service Commission of Pennsylvania and the Pennsylvania operators appeared before the Commission to obtain a reduction of their rates to the Ohio level. Having failed, they have executed an about face and in this Court are seeking to fasten a similar burden on Ohio.

The foregoing discussion relates entirely to the low interstate rates from the southern fields. But they are not the only low interstate competitive rates that the Commis-

sion refused to disturb. There is another set of competitive interstate rates from transfer points on the bank of the Ohio River in the No. 8 district to Cleveland and other northeastern Ohio destinations which apply on interstate shipments of bituminous coal originating in Pennsylvania and West Virginia and moving by river to the transfer points referred to. These are customarily referred to as ex-river rates. They move exactly the same coal as is moved on all-rail interstate rates from Pennsylavania and West Virginia except that they are for practical purposes confined to the output of mines that have access to river transportation.

These ex-river rates were left undisturbed by the Commission in this case although, unlike the all-rail rates from the south, the Commission discussed them at very great length and found that they were not only less than reasonable maximum rates but so low as actually to be unlawful. (R. 37-43.)

The situation with regard to the ex-river rates and their place in this proceeding is epitomized in the following passage from the Commission's report (R. 42-43):

> "The differences between the all-rail and rail-and-water rates in many instances are too great. *That issue is not here presented.* This increase, however, should be sufficient only to permit mines restricted to all-rail routes to compete with those having river outlets in order to maintain rail-and-water rates on a level which will induce the free movement of coal by barge and encourage and develop water transportation in furtherance of the policy declared by Congress in section 500 of the Transportation Act, 1920. Domestic coal is not ordinarily moved by river because of the degradation that takes place in dumping, but much special purpose coal and coal for steam purposes used in the iron and steel industry can move by barge without injury as it is required to be broken up or otherwise disintegrated before usage. As previously stated,

the petitions seeking reopening of the ex-river cases to determine this issue are now before us for consideration." (Emphasis ours.)

This statement by the Commission itself discloses the most flagrant disregard of the rights of Ohio and the most oppressive treatment of her commerce that could well be imagined. In an investigation to determine whether the Ohio rates are too low and should be raised in order to conform them to the corresponding interstate rates, the Commission finds, in substance, after the question has been exhaustively presented by both sides, that there are interstate ex-river rates in effect which are too low, that competitive coals move on those rates to Ohio destinations, and that they should be increased. But the Commission leaves these rates absolutely undisturbed on the ground that "that issue is not here presented." (R. 42)

This, we submit, is absolutely conclusive and controlling error. The issue was presented. It was presented exactly as the issue with respect to all of the group rates was presented in the *State Corporation Comm. case* discussed above. It was presented because it is an essential prerequisite to the raising of state rates by the federal Commission that the corresponding interstate rates shall first be found to be reasonable or made so. This does not leave the Commission free to pick and choose among a great body of relevant interstate rates and, having found one that is reasonable or having selected one to fix as reasonable, adopt that rate as a yardstick for intrastate rates, leaving all other interstate rates at no matter what level. Here it did not only that *but it found at the same time that certain of the rates which it was leaving undisturbed were too low and ought to be raised.* Whether they have since been raised or not this record does not show and it is immaterial; because the raising of them was a prerequisite to the invasion of the state, and the state had a right to a full hearing on that question. *Georgia Public Service*

Commission v. United States, 39 F. (2d) 167; affirmed in *Georgia Comm. v. United States,* 283 U. S. 765, 770. This essential prerequisite to the Commission's action is lacking and we have been denied that hearing. The Commission erred in holding that the issue of the reasonableness of the ex-river rates was not presented, and for this reason the entire order must fall.*

This Court has made it plain that a persons-and-places discrimination order against intrastate rates cannot stand unless all the corresponding interstate rates are fixed. In the *Florida case* it held the order bad, as a persons-and-places order, because, having passed only on certain limited interstate rates, it required intrastate rates to be raised throughout the state. The Court said (282 U. S., at p. 208):

> "The limitation of the Commission's finding as to interstate rates, and of the order prescribing them, to transportation from points in the northern part of Florida to points in Georgia, defined the interstate commerce which was deemed to be concerned. All of this commerce was potential, no actual movement from Florida to Georgia having been shown. It would be an extreme and unwarranted assumption that to protect this interstate commerce from unjust discrimination as between persons or localities, it was necessary to alter the existing rates for the transportation of logs between all points whatever within Florida."

*Under date of December 5, 1933, the Commission took the action forecast in the report in this case by raising the ex-river rate to Cleveland to $1.45 per ton. *Coal, Bituminous, Ex-River, from Colona and Conway, Pennsylvania,* 197 I. C. C. 617. This order has not at this writing become effective. A petition to enjoin it has, we understand, been filed in the District Court for the Northern District of Ohio and the case is now *sub judice*. We do not know whether the increase will ever become effective. No appellant in this proceeding is a party to that case. We do not think the action of the Commission taken seven months after the date of the order in our case can strictly be invoked to save that order. We are willing, however, to have this Court consider the order here in the light of the report and order of the Commission of December 5, 1933, increasing the ex-river rate to Cleveland to $1.45 per ton, provided we can have the benefit here of certain admissions made by the Commission in that report which we believe to be wholly destructive of its order in this case.

And in *United States v. Louisiana*, 290 U. S. 70, the Court characterized its finding on this point in the *Florida case* thus (p. 79):

> "A question different from that before us was presented in *Florida v. United States, supra.* There the discrimination was essentially one of undue prejudice against shippers, confined by the evidence to rates prevailing in northern Florida. It involved only one railroad and one commodity. It was not the general revenue proceeding authorized by § 15a. The Court was careful to point out that the Commission had undertaken to establish a state-wide level of intrastate rates without any findings with respect to the *corresponding* interstate traffic which would tend to support the conclusion that a state-wide alteration of intrastate rates was necessary to protect the interstate commerce involved." (Emphasis ours.)

The situation thus described in the *Florida case* is not identical with that at bar but it is closely analogous. This court there disapproved an order of the Commission increasing state rates to destinations to which the interstate rates were not fixed. Here the Commission increased state rates to destinations to which only certain of the corresponding interstate rates, and those the highest, were fixed. If it was not necessary to raise the state rates in the Florida case to destinations to which *no* interstate rates were fixed, we submit that it was neither necessary nor proper to raise the state rates in this case to destinations to which only part of the interstate rates were fixed and the lowest left undisturbed.

The learned court below does not successfully meet this point, although it recognizes that it must be met if the Commission's order is to be upheld. It says (R. 470):

> "The Commission also found that the interstate rates from the Pittsburgh, Freeport, Connellsville and Fairmont districts to destinations in northeastern Ohio were reasonable. It is contended that the order is void because the Commission did not also examine into and

make findings upon all other rates from the Inner and Outer Crescents to northeastern Ohio. This contention is likewise without merit. It is enough if discrimination in respect of the Pittsburgh, Freeport, Connellsville and Fairmont districts, and the coal operators of these districts, be found. There was no obligation upon the Commission to find specifically that each individual rate was reasonable, or that rates from all localities into northeastern Ohio were reasonable. Cf. United States v. Louisiana, supra (decided Nov. 6, 1933). If it be contended that any rate from some other locality is unreasonable, and it is desired in good-faith to test this question, the one so contending is afforded a remedy by application to the Interstate Commerce Commission."

This passage makes two points; first, that the Commission is not bound to pass on each individual interstate rate; second, that one contending that the rates from the southern crescents are unreasonable (too low) has a remedy before the Commission.

The lower court's first ground is entirely untenable. Particular rates may of course be examined and taken as typical of a large number in issue *when it appears that they are typical.* The rule was invoked in *United States v. Louisiana,* 290 U. S. 70, cited by the court below, because the Commission had before it "evidence deemed typical of the whole rate structure." (p. 76.) Moreover, that was a revenue case involving a nationwide increase of all rates in connection with which the Commission has express power to "adjust any particular rate which it may find to be unjust or unreasonable" (p. 76) and the court gave great weight to "the administrative necessities" of the situation. Also in *Georgia Comm. v. United States,* 283 U. S. 765, where the doctrine of typical rates was elaborated, it was emphasized that the proof must be "specific and typical." (p. 774.) But here, far from there being evidence that the rates examined were typical, *there was an admission by our opponents that they were not.* (R. 590, 690) Further-

more it did not involve too large a body of rates to be examined. We ourselves offered extensive evidence on this very point showing by the most careful tests that every rate from districts south of Fairmont is on a lower level even than the reduced Ohio rates. (R. 1193-1202, 1206-1208; I. C. C. Exhibits 284-308, 329-332; Vol. III, Exhibits before I. C. C., pp. 325-333; Vol. IV, Exhibits before I. C. C., pp. 41-44) It was no doubt for the reason that it was faced with this evidence that the Commission did not take the ground that the western Pennsylvania and northern West Virginia rates were typical. It could not have done so. For the same reason the doctrine invoked by the court below cannot save the order.

The second reason given by the court below in justification of the Commission's disregard of the low southern rates, namely, that we have a remedy before the Interstate Commerce Commission, is equally fallacious. In the first place the Commission has held categorically that it has no jurisdiction of undue preference and prejudice *in favor of* interstate and *against* intrastate commerce. *Mutual Creamery Co. v. American Ry. Express Co.*, 132 I. C. C. 207. If the Commission is right as to this, we are remediless. But even if the Commission is wrong and we could file a complaint under section 3 (after obtaining a writ of mandamus to compel the Commission to entertain it), the Commission's order cannot be upheld. The federal government, in invading what would otherwise be the realm of state sovereignty, may go only as far as is necessary to accomplish a legitimate federal purpose and no further. It may not trespass upon the State domain unnecessarily, and it may not do an unnecessary injury to the rights of a State or its citizens. This is clearly established by *Houston & Texas Ry. v. United States*, 234 U. S. 342, in which the federal power to remove undue preference and prejudice as between intrastate and interstate commerce was first declared and defined. The Court there said that "Congress has such power, by reason of its control over the interstate

carrier in all matters having such close and substantial relation to interstate commerce that it is *necessary or appropriate* to exercise the control for the effective government of that commerce." (Emphasis ours.) It is neither necessary nor appropriate that the federal authority, in protecting interstate commerce moving on the high level of interstate rates from the competition of intrastate rates, to expose the internal commerce of the state to like prejudice and discrimination from the interstate commerce moving on the low level of rates, *because the Commission has power to avoid both evils.* It is not necessary or appropriate that it should exert the power so as to remedy one but create the other.

But whether or not Congress has power to deal so ruthlessly with intrastate commerce, it has not given such power to the Commission. The Commission's power is limited to the removal of *undue or unreasonable* prejudice against persons and localities in interstate commerce caused by state rates. We submit that where the Commission permits interstate rates on the same commodity to the same markets to remain on substantially different levels and the state in which that market lies in order to preserve its own commerce fixes an intrastate rate on that commodity to that market at the lower level of interstate rates, it creates indeed a prejudice against that portion of interstate commerce that is on the higher level, *but it does not create an undue and unreasonable prejudice.* It is only acting duly and reasonably to protect its own commerce against an undue prejudice which it cannot, and which the Interstate Commerce Commission has not, corrected.

IV.

THE INTERSTATE COMMERCE COMMISSION'S ORDER IS NOT A VALID EXERCISE OF THE POWER TO REMOVE REVENUE DISCRIMINATION AGAINST INTERSTATE COMMERCE BECAUSE THE COMMISSION MADE NO FINDING THAT THE INCREASES IN INTRASTATE RATES ORDERED BY IT WOULD INCREASE INTRASTATE REVENUES.

(Assignments of Error I, II, III, XII, XV, XXI)

The court below refused to uphold the Commission's order as a requirement for the removal of revenue discrimination against interstate commerce. It discussed the question at length, saying at the outset that the evidence before the Commission and its subordinate findings of fact might possibly be insufficient to sustain the conclusion of discrimination against interstate commerce (R. 468) and concluding with the statement that on the whole it preferred to place its decision on the single ground of the existence or non-existence of preference and prejudice as between persons and localities. (R. 469) The authority relied upon for this view was *Florida v. United States*, 282 U. S. 194, and the ground was that, in the language of that case, "it must appear that there are findings, supported by evidence, of the essential facts as to the particular traffic and revenue, and the effect of the intrastate rates, both as existing and as prescribed, upon the income of the carrier, which would justify that conclusion." This means that there must be evidence and findings as to the effect of the intrastate rates, both existing and prescribed, on the carrier's *intrastate* revenues. The reason for this rule cannot be better stated than in the case cited. This Court there said (282 U. S. at p. 214):

> "In considering the authority of the Commission to enter the state field and to change a scale of intrastate rates in the interest of the carrier's revenue, *the question is that of the relation of rates to income. The rais-*

ing of rates does not necessarily increase revenue. It may in particular localities reduce revenue instead of increasing it, by discouraging patronage." (Emphasis ours.)

There was no finding of this kind in the instant case and could have been none. The only allusion to the matter is in a finding which simply reproduces the language of the statute, to the effect that the intrastate rates "result and will result in undue, unreasonable, and unjust discrimination against interstate commerce, in violation of section 13 of the act." (R. 64) This is wholly insufficient. The identical question was involved in the *Florida case*, where this Court said (p. 213):

> "In the paragraph, which we have quoted, containing the ultimate finding of the Commission with respect to the unjust discrimination caused by the existing intrastate rates as between persons and localities, there is a concluding clause that the intrastate rates result 'in unjust discrimination against interstate commerce.' *This general statement in the language of the statute, neither standing alone nor taken in its context, could be regarded as sufficient* to support a statewide order from the standpoint of income, in the absence of supporting findings of fact as to the revenue *from the traffic in question.*" (Emphasis ours.)

and further (pp. 214-215):

> "The Commission made no findings as to the revenue which had been derived by the carrier *from the traffic in question*, or which could reasonably be expected *under the increased rates*, or that the alteration of the intrastate rates would *produce*, or was likely to *produce*, additional income necessary to prevent an undue burden upon the carrier's interstate revenues and to maintain an adequate transportation service." (Emphasis ours.)

If the body of the Commission's report be examined it will be found that there is not a word with regard to the effect upon *intrastate* income of the required intrastate increases. The first reference to revenue is the statement that if the Ohio intrastate reductions continued *and spread to interstate fields* the estimated revenue losses to the carriers would be so much. (R., rep. 421.) This does not relate to intrastate revenues but to all revenues. The Commission then says that detailed figures "of the losses of revenue because of the reductions here under consideration" will be discussed later. This detailed discussion is found under the heading "Effect of Reduced Rates on Carriers' Revenues." (R. 59) On account of the importance of the question we quote all of this passage (R. 60-61):

> "The reduced intrastate rates based on its [B. & O.] intrastate coal tonnage to the principal consuming points in Ohio in 1931, would result in a reduction of $226,000 in the revenues of this line.
>
> "The principal coal-carrying roads have estimated the reduction in revenues that will result *if the interstate rates* from mines in Pennsylvania, Virginia, and West Virginia to Cleveland, Lorain, Akron, Canton, Massillon, Alliance, and other important consuming points in northeastern Ohio are reduced by the same amounts as applied to the intrastate rates. The reduction on the Pennsylvania would be $948,447 if based on 1929 tonnage, and $516,400 if based on 1931 tonnage. The estimated reduction in revenue for other lines based on 1931 tonnage is as follows: New York Central, $202,666; Pittsburgh & Lake Erie, including tonnage received by it from the Monongahela, the Montour, the Pittsburgh, Chartiers & Youghiogheny, and the Pittsburgh & West Virginia in Pennsylvania, $331,375; and Baltimore and Ohio, $215,000. The Norfolk & Western estimates a reduction in revenue of about $500,000 based on its 1929 tonnage.
>
> "If a corresponding reduction were made *in the interstate rates* to all destinations in central territory, it would result in a loss of revenue based on 1931 tonnage of $3,434,745 for the Pennsylvania, $1,271,291

for the New York Central, and $1,938,044 for the Pittsburgh & Lake Erie. Coal tonnage constituted 55.3 per cent of the total freight tonnage of the latter line in 1931. The effect that a reduction in interstate rates on coal to Ohio will have on the revenues of other lines is not shown in specific amounts but there is a substantial volume of coal destined to Ohio which is originated on or carried by the Pocahontas lines and by such lines as the Montour, and Monongahela, and the Pittsburgh & West Virginia, which derive the greater portion of their revenue from coal traffic. Far greater losses would result *if the reductions were reflected to related territories* and this greater estimated loss on account of maintaining existing relationship of rates has been discussed in the early part of this report." (Emphasis ours.)

A careful reading of this will disclose the fact that there is no reference whatever to intrastate revenues except in the first sentence. *All the other figures apply to interstate traffic.* The one reference to intrastate traffic is the statement that the reduced intrastate rates would result in a reduction of $226,000 in the revenues of the Baltimore & Ohio *based on its tonnage of 1931.* This does not meet the requirements of the rule. There must be a finding with respect to the future effect upon income, since, as pointed out by the Supreme Court in the *Florida case,* the raising of rates "may in particular localities reduce revenue instead of increasing it, by discouraging patronage."

The reason the Commission did not and could not make any such finding here is strikingly disclosed by the findings contained in the Summary of its report to the following effect (R. 62):

"The use of substitute fuels adds to the coal producer's difficulty while substituted modes of transportation are reducing the revenues of the railroads. Not only is the truck being used to affect the railroads' revenues adversely but the barge lines in the very territory here under consideration are displacing much railroad tonnage by use of the waterways. The volume

of coal trucked for short distances in the mining districts of Ohio is shown in a few instances. Apparently this form of competition is increasing as good roads are being built."

The controlling influence of the forms of competition here referred to upon the question of the revenue effect of the required increases is illustrated by the comparative table of ex-river and all-rail rates that appears earlier in the report. (R. 42) The Commission there finds that Ohio River mines *in the Pittsburgh district* can ship to Cleveland and Lorain via river and rail through Martin's Ferry, O., using the identical lines of the Ohio carriers which the Ohio shippers use, at a total transportation cost of $1.45 per ton, from mine to destination, whereas the Commission's order requires the Ohio shippers to pay $1.74 *from the Ohio No. 8 district* instead of $1.45 which they formerly enjoyed. *This compulsory increase from $1.45 to $1.74 will net the carriers nothing.* Instead it must sharply reduce their earnings. It will necessarily divert a large tonnage from Ohio No. 8 mines to Ohio River mines in the Pittsburgh District. Every ton of coal so diverted will entail a loss of intrastate revenue of $1.45 per ton. Here is a clear case where the increase in rate from $1.45 to $1.74 will "discourage patronage". Moreover, while it is irrelevant, we may point out that the interstate revenue received by the railroads on traffic so diverted will be only $1.27 per ton, the ex-river rate from Martin's Ferry to Cleveland. In other words, even if account be taken of the gain in *interstate* revenue as well as the loss in *intrastate* revenue on movements of this character a net loss still appears. The question of revenue effect was thoroughly analyzed from this point of view in the evidence before the Commission and it was shown that by reason of shifts of tonnage similar to that just discussed the proposed increases in the Ohio rates would produce a reduction in railroad revenues as a whole (both intrastate and interstate) rather than an increase. (R. 1036-1041)

The decision of this Court in *United States v. Louisiana*, 290 U. S. 70, is not inconsistent with our position on this question. That case grew out of a petition filed by Louisiana carriers with the Interstate Commerce Commission under the 13th section, seeking an order requiring increases in Louisiana intrastate rates, which had been refused by the Louisiana Public Service Commission, equal to the surcharges imposed upon interstate rates as a result of the *Fifteen Per Cent Case, 1931*, 178 I. C. C. 539; 179 I. C. C. 215. At the conclusion of the 13th section proceeding the Commission issued its order (*Increases in Intrastate Rates*, 186 I. C. C. 615) requiring the carriers to charge upon specified commodities and all less than carload shipments in intrastate commerce in Louisiana the same surcharges as applied to interstate rates under the authority of the *Fifteen Per Cent Case*. A statutory court enjoined the order of the Commission, and an appeal from its decree was taken to this Court.

One of the grounds for the decision of the statutory court is shown in the following excerpt from the opinion of this Court (pp. 72-73):

> "In setting aside the order, the court below rested its decision upon the inadequacy of the Commission's findings. It thought that * * * the order could not be supported as a revenue measure *because there were no findings that the increased rates would produce an increase in carrier income.*" (Emphasis ours.)

This Court rejected that view. It stated that while it did not commend the form in which the findings were cast, "the report, read as a whole, sufficiently expressed the conclusion of the Commission, based upon supporting data, including estimates of experienced railroad traffic men, to which the report refers, that the probability of increased revenue was sufficiently great to make the increase of rates a reasonable exercise of sound managerial judgment." (p. 80) The particular findings of the Commission were described by the Court in the following language (p. 81):

"'It is estimated that, based on the traffic of 1931, the application of the surcharges on the excepted commodities would produce additional annual revenue' in substantial amounts named with respect to each of the carriers participating in the traffic, and continued, saying: 'Railroad traffic men expressed the opinion that, *notwithstanding possible diversion of traffic to other transportation agencies,* the addition of the surcharge to the *intrastate rates* would produce an increase in revenue.' And as bearing upon the estimated revenue increase the Commission said: 'There is nothing of record which warrants the conclusion that the situation as to fertilizer, cotton seed, cotton seed products, fresh vegetables, or sweet potatoes is different in Louisiana from what it is in other parts of the country, or in surrounding states where surcharges are now being assessed. Similar allegations *with respect to the possible effect of truck competition* and as to the ability of various commodities to stand any increase, were made in Ex parte 103 [The Fifteen Per Cent Case, 1931] and were considered in reaching our conclusions. Nor is there anything to show that the movement of sweet potatoes will be adversely affected by the application of a surcharge thereon *without a similar charge on other potatoes.*'" (Emphasis ours)

This strongly supports every element of our position on this question. It shows not only that the question of increased revenues arises with respect to intrastate traffic only but also that, in determining this question, the future effect of competitive forms of transportation and competitive commodities must be taken into account.

The recent decision in *Florida v. United States,* —— U. S. ——, decided April 7, 1934, confirms all we have said with regard to the necessity for findings as to the effect of intrastate rates *on intrastate revenues.* That was an appeal from the decree of a statutory district court refusing to enjoin the order of the Interstate Commerce Commission which was made after further hearings following the decision of this court in *Florida v. United States,* 282 U. S.

194, holding the prior order of the Commission bad for lack of the necessary findings. The Court examined the new findings of the Commission and held that they were sufficient. Among those referred to and quoted were findings as to the volume of *future* movement of intrastate traffic on the increased rates and the difference in the *intrastate* revenues that would result from the increased rates *on that basis* and those produced by the lower state-made rates. These findings were held sufficient. There were no such findings in the instant case and there could have been none, since the evidence would not have supported them.

That this is in fact the true meaning of section 13(4) is placed beyond doubt by the first case in which the offense of revenue discrimination was defined and explained. *Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co.*, 257 U. S. 563. This Court there said (pp. 585-586):

> "Intrastate rates and the income *from them* must play a most important part in maintaining an adequate national railway system. Twenty per cent. of the gross freight receipts of the railroads of the country are from intrastate traffic, and fifty per cent. of the passenger receipts. The ratio of the gross intrastate revenue to the interstate revenue is a little less than one to three. If the rates, on which *such* receipts are based, are to be fixed at a substantially lower level than in interstate traffic, the share *which the intrastate traffic will contribute* will be proportionately less. * * * The effective operation of the act will reasonably and justly require that *intrastate traffic should pay* a fair proportionate share of the cost of maintaining an adequate railway system." (Emphasis ours.)

and further (pp. 589-590):

> "Congress in its control of its interstate commerce system is seeking in the Transportation Act to make the system adequate to the needs of the country by securing for it a reasonable compensatory return for all the work it does. The States are seeking to use that same system for intrastate traffic. That entails

large duties and expenditures on the interstate commerce system which may burden it *unless compensation is received for the intrastate business* reasonably proportionate to that for the interstate business. Congress as the dominant controller of interstate commerce may, therefore, restrain undue limitation of the earning power of the interstate commerce system *in doing state work.*" (Emphasis ours.)

Clearly it cannot be doubted that the test of revenue discrimination is whether the state rates, if increased, would produce more state revenue. The Commission did not find that the increases required by it would have that effect and on the record it could not have so found. The court below was right in refusing to uphold the order as one based on a finding of revenue discrimination.

V.

THE APPEAL IN NO. 886 SHOULD BE DISMISSED AS MERELY MOOT.

The orders appealed from in No. 886, which granted a stay for sixty days to enable the plaintiffs below to perfect their appeal to this Court, expired by the lapse of time under their own terms on March 20, 1934. The appeal from said orders is therefore now merely moot and should be dismissed. *United States v. Anchor Coal Company,* 279 U. S. 812.

Disclaimer.

The court below attributed the following argument to appellants (R. 471):

> "Lastly, it is urged, but with less vigor, that the intrastate carriers are justified in lowering intrastate rates for competitive reasons, and that only by the lowering of such rates could the Ohio carrier increase its tonnage, in competition with interstate carriers for this identical type of freight elsewhere produced."

We respectfully disclaim this argument. We did not advance it below and we do not advance it here. Apparently we failed to make our contentions clear in the District Court. The only relevancy which competition has in the issues here presented is its bearing on the forecast of the revenue effect of intrastate increases.

CONCLUSION.

For the reasons herein stated, we respectfully submit that the decrees below should be reversed with instructions to the court below to enter a decree in accordance with the prayers of the original petitions.

Respectfully submitted,

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APPENDIX A.

Interstate Commerce Act, Section 13, pars. (3) and (4).
(c. 91, sec. 416, 41 Stat. 484; 49 U. S. C. A., c. 1, sec. 13, pars. (3) and (4)).

Sec. 13, par. (3). Whenever in any investigation under the provisions of this chapter, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, the commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this chapter with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the commission. The commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this chapter.

Sec. 13, par. (4). Whenever in any such investigation the commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is forbidden and declared to be unlawful it shall prescribe the

rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

APPENDIX B.

Restatement of Portion of Exhibit No. 146 Relating to Cost of Transporting Coal From Ohio No. 8 District to Cleveland, Ohio, Using the Trains in Which the Coal was Actually Handled as Shown Thereon, the Same Data as to Unit Costs, and Following the Same General Methods of Computation Employed in Exhibit No. 146, but Computing the Costs Separately for the Movement from the Coal District to Brewster and for the Movement from Brewster to Cleveland and Adding the Two Figures Together, as Found Proper by the Commission (R. 32-33).

STATEMENT SHOWING AGGREGATE NUMBER OF TRAIN-MILES, LOCOMOTIVE-MILES, AND GROSS TON-MILES OF A REPRESENTA
COAL, IN ADDITION TO OTHER FREIGHT, WAS TRANSPORTED FROM THE OHIO NO. 8 DISTRICT TO CLEVELAND, OHIO, AN
INVOLVED IN THE MOVEMENT OF A LIKE NUMBER OF COAL TRAINS OF THE SAME NUMBER OF GROSS TON-MILES, INCL

	No. of Trains or Trips	LOADED MOVEMENT				
		Train-Miles		Locomotive-Miles		Total
		Total	Average	Total	Average	Train
	(1)	(2)	(3)	(4)	(5)	(6)
A. PINE VALLEY TO BREWSTER:						
1. Thru Trains:						
(a) January 1930	46	2,898	-	2,898	-	-
(b) July 1930	39	2,457	-	2,457	-	-
(c) January 1931	34	2,142	-	2,142	-	-
(d) July 1931	43	2,709	-	2,709	-	-
(e) T o t a l	162	10,206	63.0	10,206	63.0	-
2. Puller Service - Pine Valley to Jewett:						
(a) January 1930	46	708	-	708	-	615
(b) July 1930	39	599	-	599	-	508
(c) January 1931	34	487	-	487	-	430
(d) July 1931	43	600	-	600	-	451
(e) T o t a l	162	2,394	14.8	2,394	14.8	2,004
B. BREWSTER TO CLEVELAND: (Thru Trains with He..):						
1. January 1930	62	4,650	-	5,215	-	-
2. July 1930	62	4,650	-	4,064	-	-
3. January 1931	56	4,200	-	4,557	-	-
4. July 1931	62	4,650	-	4,650	-	-
5. T o t a l	242	18,150	75.0	19,286	79.7	-
C. T O T A L	-	-	152.8	-	157.5	-
D. Deduct gross ton-miles of cabooses - 1. Pine Valley to Brewster (12,600 train-miles, column 2, x 20 tons)						
2. Brewster to Cleveland (18,150 train-miles, column 2, x 20 tons)						
E. Gross ton-miles cars and contents						
F. Number of loaded cars - 1. Pine Valley to Brewster (divide preceding gross ton-miles by 65 miles haul x 75.2 gross tons per loaded car - 4,737.6)						
2. Brewster to Cleveland (divide preceding gross ton-miles by 75 miles haul x 75.2 gross tons per loaded car - 5,640.0)						
G. Net tons - 1. Pine Valley to Brewster (10,408 loaded cars x 54.8 tons per car)						
2. Brewster to Cleveland (8,485 loaded cars x 54.8 tons per car)						
H. Train-miles - 1. Pine Valley to Brewster (Columns 2 and 6 - 10,806 plus 2,394, plus 2,004)						
2. Brewster to Cleveland (Column 2)						
I. Locomotive-miles - 1. Pine Valley to Brewster (Columns 4 and 7, 10,206 plus 2,394, plus 2,004)						
2. Brewster to Cleveland (Columns 4 and 7, 19286 plus 986)						
J. Car-miles - loaded movement - 1. Pine Valley to Brewster (10,408 loaded cars x 65 miles - 655,704, plus caboose mileage 12,600)						
2. Brewster to Cleveland (8,485 loaded cars x 75 miles - 636,375, plus caboose mileage 18,150)						
K. Gross ton-miles - loaded movement (including assembling): 1. Train haul - Pine Valley to Brewster (item "C" supra)						
2. Assembling - 10,408 cars from assembling point to mine and return - 4.5 miles each direction.						
3. Train haul - Brewster to Cleveland						
L. Return of empty cars - Road service: 1. Car-miles (a) Cleveland to Brewster (For this purpose same number of car-miles used as used for loaded move						
(b) Brewster to Pine Valley (For this purpose same number of car-miles used as used for loaded move						
2. Gross ton-miles (a) Cleveland to Brewster (636,375 car-miles x 30.4 tons - 19,338,060, plus 18,150 caboose miles x						
(b) Brewster to Pine Valley (655,704 car-miles x 30.4 tons - 19,936,362, plus 12,600 caboose miles x						
3. Train-miles (a) Cleveland to Brewster (19,345,060 gross ton-miles divided by 2,060 gross tons, representing we						
(b) Brewster to Pine Valley (19,938,362 gross ton-miles divided by 2,060 gross tons, representing we						
4. Locomotive-miles (Same as train-miles)						

UMBER OF T AIN-MILES; LOCOMOTIVE-MILES; AND GROSS TON-MILES OF A REPRESENTATIVE NUMBER OF TRAINS IN WHICH EIGHT, WAS TRANSPORTED FROM THE OHIO NO. 8 DISTRICT TO CLEVELAND, OHIO, AND CALCULATION OF SERVICE UNITS OF A LIKE NUMBER OF COAL TRAINS OF THE SAME NUMBER OF GROSS TON-MILES, INCLUDING RETURN OF EMPTY CARS

LOADED MOVEMENT				LIGHT MOVEMENT - PULLER AND HELPER SERVICE				Gross Ton-Miles	
Train-Miles		Locomotive-Miles		Total Miles		Average Miles per Train		Pine Valley to Brewster	Brewster to Cleveland
Total	Average	Total	Average	Train	Locomotive	Train	Locomotive		
(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
2,898	-	2,898	-	-	-	-	-	13,756,941	-
2,457	-	2,457	-	-	-	-	-	8,593,780	-
2,142	-	2,142	-	-	-	-	-	9,295,354	-
2,709	-	2,709	-	-	-	-	-	11,967,992	-
10,206	63.0	10,206	63.0	-	-	-	-	45,614,047	-
708	-	708	-	615	615	-	-	1,491,488	-
599	-	599	-	505	505	-	-	1,657,277	-
487	-	487	-	430	430	-	-	1,157,065	-
600	-	600	-	456	456	-	-	1,659,065	-
2,394	14.8	2,394	14.8	2,004	2,004	12.4	12.4	5,944,895	-
4,650	-	5,215	-	-	502	-	-	-	13,107,682
4,650	-	4,866	-	-	155	-	-	-	12,264,410
4,200	-	4,557	-	-	331	-	-	-	13,696,611
4,650	-	4,650	-	-	-	-	-	-	9,152,561
18,150	75.0	19,288	79.7	-	988	-	4.1	-	48,221,064
-	152.6	-	157.5	-	-	12.4	16.5	49,558,940	48,221,064
es, column 2, x 20 tons)								252,000	-
es, column 2, x 20 tons)									365,000
								49,306,940	47,858,064
les by 65 miles haul x 75.2 gross tons per loaded car - 4,737.6)								10,408	-
les by 75 miles haul x 75.2 gross tons per loaded car - 5,640.0)								-	8,488
								570,388	-
								-	464,978
s 2,004)								14,604	-
								-	18,150
plus 2,004)								14,604	-
								-	20,272
miles - 655,704, plus caboose mileage 18,600)								668,304	-
miles - 636,375, plus caboose mileage 18,150)								-	654,525
ley to Brewster (item "C" supra)							49,558,940		
ars from assembling point to mine and return - 4.5 miles each direction							4,477,521	54,036,461	-
to Cleveland								-	48,221,064
(For this purpose same number of car-miles used as used for loaded movement - item "J")								-	654,525
ey (For this purpose same number of car-miles used as used for loaded movement - item "J")								668,304	-
(636,375 car-miles x 20.4 tons - 12,982,050, plus 18,150 caboose miles x 20 tons - 365,000)								-	13,345,050
ey (655,704 car-miles x 20.4 tons - 13,376,362, plus 18,600 caboose miles x 20 tons - 372,000)								13,628,362	-
(13,345,050 gross ton-miles divided by 2,060 gross tons, representing weight of train of 100 empty cars, plus caboose)								-	6,478
ey (13,628,362 gross ton-miles divided by 2,060 gross tons, representing weight of train of 100 empty cars, plus caboose)								6,616	-
								6,616	6,478

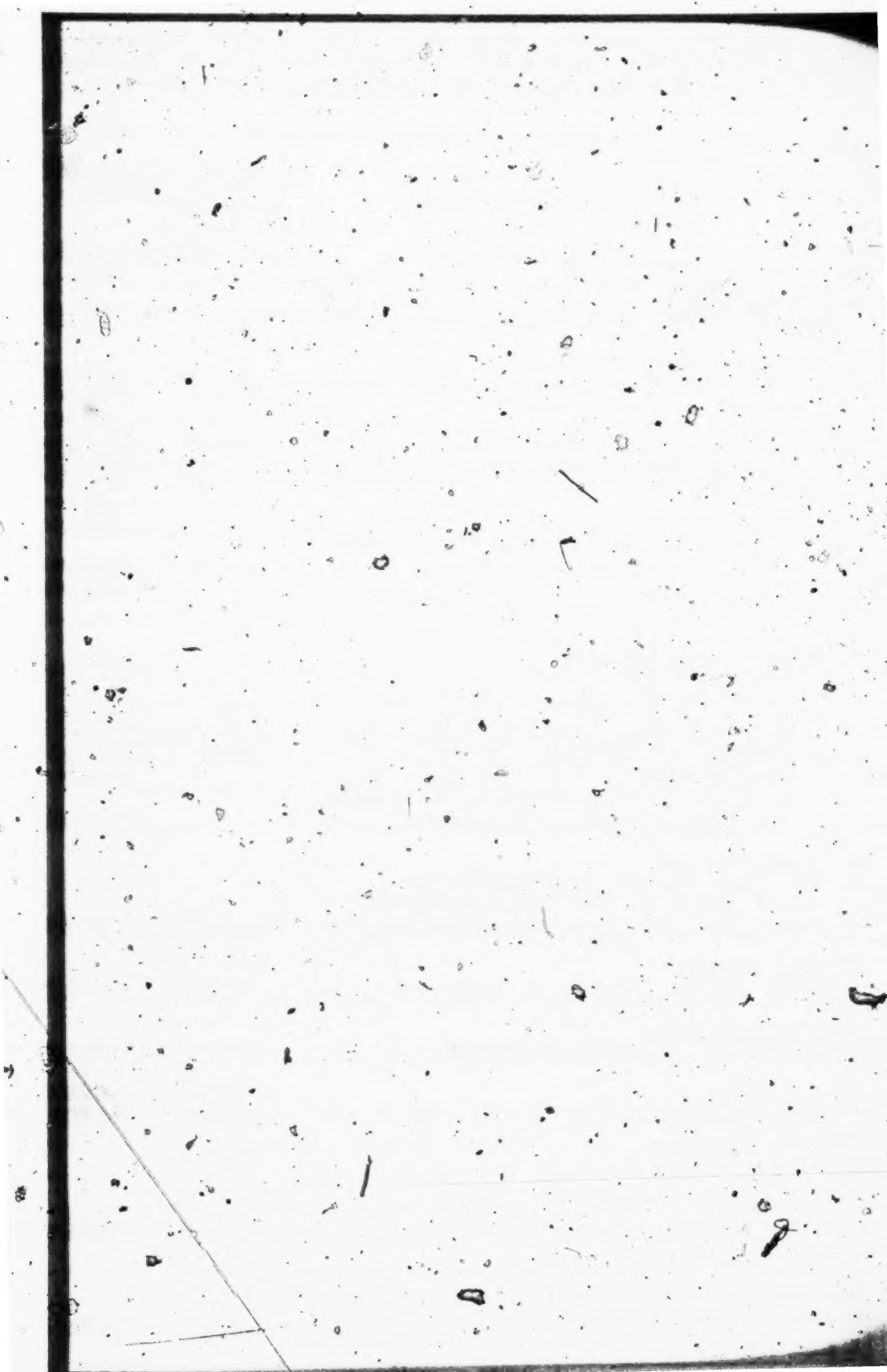
COMPUTATION OF FREIGHT OPERATING UNIT COSTS, AS DETERMINED FROM FREIGHT O
EXPENSES FOR THE YEARS ENDED DECEMBER 31, 1930 AND 1931, AND THEIR APPLICATIO
UNITS REQUIRED FOR TRANSPORTATION OF COAL FROM PINE VALLEY TO CLEVELAND

	Wheeling and Lake Erie Railway Company Computation of Unit Costs				Applicat coal Pine V 570,558 net tons
	Freight Operating Expenses 1930 & 1931	Kind of Unit	Number of Units 1930 & 1931	Cost Per Unit (1)÷(3)	Kind of
	(1)	(2)	(3)	(4)	(5)
A. TRACK MAINTENANCE: Accounts 208-226 - Other than yard tracks	$ 2,362,627	1000 Gross ton-miles (Excl. locomotive)	4,933,352	$ .479	1000 Gross ton-mi
B. LOADED HAUL - ROAD SERVICE:					
1. Dispatching	368,880	Train-miles:	2,954,906	.125	Train-miles
2. Trainmen	1,006,427	Train-miles:	2,954,906	.341	
		Adjusted-excess const. miles - 110%	-	.375	Train-miles
3. Train supplies and expenses	287,582	100 Car-miles (including caboose)	1,085,158	.265	100 Car-miles (inc
4. Locomotive fuel and water	848,491	1000 Gross ton-miles	4,933,352	.171	1000 Gross ton-mil
5. Enginemen (Train)	870,657	Locomotive-miles:	3,070,362	.284	
		Adjusted - excess constructive miles and heavier locomotives - 120%		.341	Locomotive-miles
6. Locomotive repairs, depreciation, retirements, lubricants and enginehouse expenses	2,085,334	Locomotive-miles:	3,070,352	.679	
		Adjusted-heavier locomotives - 141%	-	.957	Locomotive-miles
Total - Sections "A" and "B"	$ 7,821,698				
C. DUTY HAUL - ROAD SERVICE:					
1. Track maintenance		1000 Gross ton-miles		.479	1000 Gross ton-mil
2. Dispatching		Train-miles	UNIT	.125	Train-miles
3. Trainmen	SAME	Train-miles	COSTS	.375	Train-miles
4. Train supplies and expenses	AS	100 Car-miles (including caboose)	SAME	.265	100 Car-miles (inc
5. Locomotive fuel and water	ABOVE	1000 Gross ton-miles	AS	.171	1000 Gross ton-mil
6. Enginemen (Train)		Locomotive-miles	ABOVE	.341	Locomotive-miles
7. Locomotive repairs, depreciation, retirements, lubricants and enginehouse expenses		Locomotive-miles		.957	Locomotive-miles
D. ASSEMBLING SERVICE: Dispatching, trainmen, train supplies and expenses, locomotive fuel, water, enginemen, repairs, etc. (Items B-3 to B-6, inclusive)	($ 5,459,001)	Train-hours	268,898	20.301	Train-hours - 5.8 c
E. STATION EXPENSES: Station employes, supplies and maintenance	861,841	Loaded cars	655,370	1.319	Loaded cars (1/2 c
F. SWITCHING EXPENSES: Yard expenses and yard track maintenance	$4,224,994	Switch engine-hours	386,382	10.929	Engine-hours - Brew
				10.929	Engine-hours - Clev
G. CAR EXPENSES:	1,530,380	100 Car-miles		1.008	100 Car-miles
Car repairs, depreciation and retirements	3,054,494	Car-days		.483	Car-days-7½ days p
				.483	Car-days-7½ days p
H. SPECIAL EXPENSES	852,798				
I. TOTAL DIRECT FREIGHT OPERATING EXPENSES	$18,346,105				
J. TRAFFIC, GENERAL AND TRANSPORTATION FOR INVESTMENT	1,824,607	Relation to direct expenses - 9.95%			
K. TOTAL FREIGHT OPERATING EXPENSES	$20,170,712				
L. AVERAGE COST PER TON - FREIGHT EXPENSES					
M. DEFICIT FROM PASSENGER-TRAIN OPERATION	582,779	Relation to total freight expenses 2.89%			
N. TOTAL COST PER TON					

PUTATION OF FREIGHT OPERATING UNIT COSTS, AS DETERMINED FROM FREIGHT OPERATING
S FOR THE YEARS ENDED DECEMBER 31, 1930 AND 1931, AND THEIR APPLICATION TO SERVICE
UNITS REQUIRED FOR TRANSPORTATION OF COAL FROM PINE VALLEY TO CLEVELAND, OHIO

[redacted]

nd Lake Erie Railway Company utation of Unit Costs			Application of unit costs to the service units required for the movement of 162 trains of coal Pine Valley to Brewster (including 162 puller trips), which would contain 10,408 cars and 570,556 net tons, and 242 trains Brewster to Cleveland which would contain 8,486 cars and 444,978 net tons					
				Units and Operating Expenses Assignable to Haul				Total
	Number of Units	Cost Per Unit		Pine Valley to Brewster		Brewster to Cleveland		Cost
of Unit	1930 & 1931	(1)÷(5)	Kind of Unit	Units	Expenses	Units	Expenses	Per Ton
(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
n-miles (Excl. locomotive)	4,935,332	$ .479	1000 Gross ton-miles-loaded haul (Incl. assembling)	54,056.461	$25,903.46	48,221.064	$23,097.09	
	2,954,906	.125	Train-miles	14,604	1,825.50	18,180	2,269.75	
e const. miles - 110%	2,954,906	.341 .375	Train-miles	14,604	5,476.50	18,180	6,806.25	
(including caboose)	1,065,158	.265	100 Car-miles (including caboose)	6,665.04	1,771.01	6,545.25	1,734.49	
miles	4,935,332	.171	1000 Gross ton-miles	54,056.461	9,240.65	48,221.064	8,245.99	
: head constructive rier locomotives- 120%	3,070,352	.281 .341	Locomotive-miles	14,604	4,979.96	20,272	6,912.75	
: ler locomotives - 141%	3,070,352	.679 .957	Locomotive-miles	14,604	13,976.03	20,272	19,400.90	
miles		.479	1000 Gross ton-miles	15,628.362	6,287.99	15,545.080	6,272.32	
	UNIT	.125	Train-miles	6,616	827.00	6,470	809.75	
	COSTS	.375	Train-miles	6,616	2,481.00	6,470	2,426.25	
ncluding caboose)	SAME	.265	100 Car-miles (including caboose)	6,665.04	1,771.01	6,545.25	1,734.49	
miles	AS	.171	1000 Gross ton-miles	15,628.362	2,530.45	15,545.080	2,658.09	
	ABOVE	.341	Locomotive-miles	6,616	2,256.06	6,470	2,209.09	
		.957	Locomotive-miles	6,616	6,331.51	6,470	6,159.45	
	268,898	20.301	Train-hours - 5.8 cars per hour	2,738.95	55,605.42	-	-	
	653,370	1.319	Loaded cars (1/2 origin and 1/2 destination)	10,408	6,864.09	8,486	5,595.95	
		10.939	Engine-hours - Brewster 8.6 cars per engine-hour	1,210.25	13,236.60	-	-	
rs	386,382	10.939	Engine-hours - Cleveland 5.0 cars per engine-hour	-	-	1,697	18,566.51	
		1.005	100 Car-miles	15,366.09	15,406.18	13,690.50	13,729.77	
		.483	Car-days-7½ days per car-Pine Valley to Brewster	78,060	37,708.98	-	-	
		.483	Car-days-7½ days per car-Brewster to Cleveland	-	-	63,697.5	30,756.91	
					$218,490.97		$159,551.80	
t expenses - 9.95%					21,141.86		15,795.88	
					$239,632.83		$174,305.28	
					$ .80961		$ .37687	
freight expenses 2.69%					$ .01184		$ .01085	
					$ .42145		$ .38570	$ .80715



APPENDIX C.

The conclusion of the Commission that the transportation costs shown in the Wheeling's cost study (I. C. C. Exhibit 146; Vol. III, Exhibits before I. C. C., p. 31) are underestimated to a substantial extent is predicated solely upon its recalculation of the study (the details of which have never been revealed), and upon the adoption of certain negative criticisms advanced by the Wheeling's opponents. It has been shown heretofore that the Commission fell into some gross mathematical error in recalculating this cost study, as a restatement of the cost to Cleveland made upon the Commission's basis shows that instead of an increase of 9.6 cents per ton, the increase is but one-half cent per ton. The remaining criticisms of the Commission—four in number—are disposed of in the verified statement of evidence filed in surrebuttal by the Wheeling. These criticisms and the disposition of them in the verified statement may be summarized as follows:

1. The first of these criticisms is that the use of the two-year period ended December 31, 1931, for the derivation of unit costs does not reflect representative expenditures per unit for the maintenance of way and equipment. In this connection the Commission refers to a criticism of the opposing carriers; that the track maintenance expenses per unit for this two-year period were substantially less than the corresponding expenses per unit for the five-year period, 1927 to 1931, inclusive (R. 32). But it clearly appears (R. 1803-1804) that the five-year period is not more representative than the two-year period due to the facts that during the years 1927, 1928 and 1929 labor costs were relatively much higher than in the years 1930 and 1931, and much higher than they are likely to be for several years to come, and that renewals of cross ties during the years 1927, 1928 and 1929 were very much greater, both in number and cost, than may reasonably be expected for any similar period in the future. It further appears that the improvement in

drainage and the adequate installation of tie plates during the period from 1925 to 1929 resulted, and will continue to result, in substantial reductions in costs of maintenance of way. The record at this point contains the unequivocal statement of the Vice President and General Manager of the Wheeling that its property was fully maintained during the years 1930 and 1931.

As to maintenance of equipment, the Commission refers to the fact (R. 32) that the item of freight-train car expenses in 1931 was less than in 1930, while the number of serviceable car-days was somewhat greater in 1931 than in 1930. While it is true there was a decrease in the amount expended for car repairs there was also a substantial decrease in the use of cars, rather than an increase as indicated by the Commission. As pointed out by the Wheeling (R. 1814-1815), the average daily number of its cars in service was 9,869 in 1930 and 8,166 in 1931 which, on the basis of 365 days, represents an aggregate of 3,602,185 serviceable car-days in 1930 and 2,980,590 serviceable car-days in 1931. The remaining disparity between the two years illustrates the statistical advantage of using a period of two years, rather than one, in such a cost study.

2. As a second objection, the Commission considered the costs to be understated because of the failure to include in them all of the service units involved in returning empty cars to the coal district. (R. 33) The record indicates no such omission. On the contrary it appears that the cost study reflects all of the service units required for this empty return movement.

Thus, in calculating these service units for the return movement of empty cars the Wheeling used a conservative basis of 100 empty cars per train although, as a general practice, it returns empty cars to the district in regular trains, which would tend to reduce the cost. No credit has been taken in the study because of cars loaded eastbound from Huron and South Lorain with ex-lake iron ore. Costs obtained from actual movements of a number of trains of

empty cars from Huron to the coal district are shown to be less than the cost found in the study. (R. 940, 943-944, 946-947, 964-966, 1325-1326, 1482.)

3. As its third specific criticism of the study the Commission refers to the failure to include the expense of transporting company material or non-revenue traffic. The record (p. 1479) shows that the non-revenue ton-miles transported are only 3.6 per cent of the total ton-miles transported. The surrebuttal statement of the Wheeling (R. 1812) shows that revenue freight absorbed the assembling costs and station expenses incident to the handling of non-revenue freight, and that there are elements in the study which offset the relatively small amount of the remaining costs incident to transportation of non-revenue freight not specifically provided for. Thus, in assembling service there is shown to be an overcharge of approximately 2.90 cents per ton due to the use of the average unit train-hour cost (although very much lighter locomotives than the average are used in this service), and due to less overtime being paid in assembling service than in total freight service. It is further shown that there is an overcharge in the study for locomotive fuel, as no credit was taken for the relatively lower consumption of fuel in moving heavy tonnage trains. (R. 961-962, 1480.)

4. The Commission also calls attention to the criticism of petitioning carriers that system average unit costs are applied to specific operations which are not themselves spread over the entire system. However, it is shown in the Wheeling's surrebuttal statement (R. 1801) that its property is so compact that the variations in terrain and climatic conditions are not such as to result in a material variation in the maintenance expenses, except as such expenses vary with use. At page 1802 of the record it is shown that, due to heavier traffic upon those portions of the line over which this coal is transported, the average maintenance cost per ton would be less than for the system as a whole, and for that reason the cost shown in the study is

overstated rather than understated. As to understatement in transportation costs the record shows (pp. 961-963) that the average unit costs for locomotive service, wages of enginemen and trainmen were increased by Wheeling's accountants because of the larger locomotives used in transporting coal, and on account of the relatively greater amount of constructive mileage paid crews engaged in this service. There is no understatement of costs in the study from the use of system averages.

CERTIFICATE OF SERVICE.

I hereby certify that I have this day served copies of this brief upon counsel for all adverse parties by mailing the same properly addressed, postage prepaid.

Dated at Washington, D. C., this 16th day of April, 1934.

ERNEST S. BALLARD,
Of Counsel.